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## NOTES.

IN the May number of the *Contemporary Review* Mr. Strachey has stated his firm belief, with all the emphasis of conviction which can be imparted by italics, that a member of the House of Commons who succeeds to a peerage of the United Kingdom may retain his seat if he refrains from demanding his writ of summons to the House of Lords.

The question is one of practical interest, but the only authorities which Mr. Strachey can produce for his startling announcement are (1) the practice of the House of Commons to await the issue of the writ of summons to the House of Lords before declaring a seat to be vacant by the accession of one of its members to the peerage; (2) the fact that peers by refraining to ask for their writs have been able to retain places in the Civil Service which are incompatible with a seat in either House of Parliament.

Neither authority can do much for Mr. Strachey's contention. The evidence which the House of Commons requires to establish a disqualification is not the same thing as the disqualification itself. Insanity is a disqualification; but the proof of insanity, sufficient to vacate the seat, before the Act of 1886, was a very difficult matter. As to the peers who occupy places in the permanent Civil Service, it should be borne in mind that the disqualification for the Civil Service is constituted not by the peerage but by actual membership of either House, and the consequent participation in active political life.

Without emulating the confidence of Mr. Strachey one may suggest some points for consideration which do not seem to have occurred to him.

The Peerage is a *status* conferring rights and imposing liabilities which are not those of the Commoner. (First Report on the Dignity of the Peerage, p. 14.) Among these the peer is entitled to

be tried by his peers for treason or felony; he is also an hereditary counsellor of the Crown, whether or no he is a Lord of Parliament. It may be suggested that the disqualification for membership of the House of Commons consists in belonging to the estate of the Baronage, and not wholly or merely in sitting in the House of Lords: for it is only by virtue of the Act of Union that an Irish peer, who receives no summons to Parliament, can sit for a British constituency. On this view the House of Commons would after a time declare a seat vacant on such evidence as would show that the sitting member, though not summoned to the House of Lords, had ceased to belong to the estate of the Commons.

Again, the issue of the writ of summons does not rest entirely with the peer who is entitled to it. The Queen might summon her hereditary counsellor to take his place in Parliament. The Lords, jealous as to the constitution of their House, might address the Crown as they did in Lord Bristol's case to issue the writ of summons (Gardiner, Hist. of England, vi. 94). The question raised amounts to this, Can a peer surrender his peerage? The answer in the *Purbeck* case, 1678 (Collins, Baronage, 293), is a negative.

W. R. A.

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A settlement executed on her marriage by an infant, unless under the authority of the Court, may be repudiated by the infant. But when the infant claims her own property free from the settlement, she must, if she takes under the settlement an interest in any other property, e.g. in property settled by her husband, make compensation out of such interest to the persons who are disappointed by her election to repudiate. Supposing such interest is settled to her separate use without power of anticipation, does the restraint on anticipation prevent her from giving it up for the purpose of such compensation? Sir W. P. Wood thought not; *Willoughby* v. *Middleton*, 2 J. & H. 344. Sir G. Jessel, however, thought that this doctrine of Sir W. P. Wood would enable her to destroy the most careful provision of her own relatives for her protection: *Smith* v. *Lucas*, 18 Ch. D. 531. Chitty J. decided *Re Wheatley*, 27 Ch. D. 606 in accordance with Sir G. Jessel's view, and *Re Vardon's Trusts*, 31 Ch. D. 275, was a similar decision of the Court of Appeal; where it was said in effect that the doctrine of compensation rests on the presumption of a general intention in the authors of an instrument that effect shall be given to every part of it; that the presumption of such general intention might be repelled by a declaration in the instrument itself of a particular intention inconsistent with the presumed general intention; and that the affixing of a restraint on anticipation was the manifesta-

tion of a particular intention to make the interest inalienable, and incapable of being given up for the purpose of such compensation. In *Hamilton* v. *Hamilton*, '92, 1 Ch. 396, a settlement was made on the marriage of a female infant, who thereby covenanted to settle her after-acquired property. By the same settlement she took interests for her separate use without power of anticipation in other property settled partly by her husband and partly by her own father. Her husband obtained a decree nisi for a divorce in December 1889. On the 6th of June 1890 she commenced an action claiming to be entitled to repudiate the covenant to settle her after-acquired property; and in this she was ultimately successful, and the only question was how far she was bound to make compensation. The divorce was made absolute on the 10th of June 1890; and the restraint on anticipation was of course inoperative during her discoverture. If nothing else had happened she would of course have been bound to make compensation out of the interests which the settlement gave her in the property settled by her late husband and by her father. But on the 14th Oct. 1890, before the trial of the action, she married again. North J. held that the restraint on anticipation revived, and relieved her from the necessity of making compensation out of the interests to which it was annexed.

This decision does not altogether square with one's ideas of natural justice. If the wife, immediately before her second marriage, had executed, as it was absolutely within her power to do, a deed removing the restraint on anticipation so far as might be necessary to give effect to any compensation she might be required to make, compensation might have been ordered. By her own act of marrying again without executing such a deed, she enabled herself to repudiate the covenant without making the compensation required by equity. If the mere fact of bringing the action did not amount to an election (and North J. held on good authority that it did not), still it might have been held to involve an offer by her to make the necessary compensation in the event of her subsequently electing against the settlement. And such an offer, if she was discovert at the time, might well have been held to amount to a disposition *pro tanto* of her interests, taking precedence of the subsequently reviving restraint on anticipation. No doubt the decree nisi was not made absolute till four days after the commencement of the action, but the action might very well be held to involve a continuing offer of the kind above suggested.

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'The cases put in argument of the company putting a known lunatic, or a known biting dog, or a known leper, or a man known

to be drunk and quarrelsome, into a carriage with one of the ordinary travelling public, have no bearing upon the present case, for the consequences likely to arise therefrom would be well known to the company when they contracted to carry the passenger. The consequences likely to arise from putting pitmen to travel with a passenger, at the time of the contract believed to be one of the ordinary travelling public, would not be that the pitmen should break the law and assault their fellow-passenger.'

These words from the judgment of A. L. Smith J. in *Pounder* v. *The North E. Railway Co.*, '92, 1 Q. B. 385, sum up the grounds on which the Queen's Bench Division have held that a railway passenger has no legal ground of complaint for being compelled to travel in the same compartment with six or seven ruffians whom he fears will, and who do in fact, brutally assault him. In the particular instance the decision of the Queen's Bench Division may have been right, but the principle embodied in his lordship's judgment is rather a startling one. Can it be maintained that a railway company and its servants owe no protection to a passenger from any peril the possible existence of which could not reasonably be anticipated at the moment when the passenger's ticket was taken? *A* takes a ticket from London to Rugby. On getting into the train he finds himself in a compartment alone with *B*, a man twice his size, by whom he has already been assaulted and placed in peril of his life, and who threatens to repeat the assault. *A* asks for a place in another carriage. The railway servants decline to give it. *A* is compelled to travel sixty miles alone with *B*, and is assaulted and nearly killed. Is it easily maintainable that there is no ground of action on *A*'s part against either the railway company or its servants?

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*Royal Aquarium &c. Society* v. *Parkinson*, '92, 1 Q.B. (C. A.) 431. This case deserves the careful attention of all county councillors. It establishes two principles of great practical importance.

1. A councillor when engaged in debate on business before the council is not exercising judicial functions in such a sense as to be able to claim absolute immunity from actions for defamation in respect of whatever he says.

2. The words of a councillor when engaged in debate are no doubt uttered on a privileged occasion; he may therefore, when acting *bonâ fide*, be often protected from civil or criminal liability for statements which are defamatory and untrue, but his claim to privilege depends on his speaking *bonâ fide* 'in the sense that he is using the privileged occasion for the proper purpose, and is not abusing it . . . . If a person from anger or some other

wrong motive has allowed his mind to get into such a state as to make him cast aspersions on other people, reckless whether they are true or false, . . . . a jury is justified in finding that he has abused the occasion.'

This is sound sense, and we believe good law. Lord Esher has done the world a service in reminding cranks or fanatics that honest enthusiasm is no excuse for reckless slander. The privileges of M.P.'s and judges are at least as wide as is required by the public interest. They should certainly not be extended to county councillors.

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*Cross* v. *Fisher*, '92, 1 Q. B. (C. A.) 467, gives effect to the rigorous provision of the Building Societies Act, 1874 (37 & 38 Vict. c. 42), s. 43, under which the directors of a building society are made personally liable for the amount of loans or deposits received in excess of the limits prescribed by the Act. Whether such exceptional legislation be expedient or not is a question open to argument, but it is certainly expedient that the court should give full effect to Acts of Parliament. The real, though unperceived difficulty in the way of codifying the law is the tendency of our judges to interpret statutory enactments with a narrowness which they do not display when called upon to interpret the principles of Common Law or of Equity. *Cross* v. *Fisher* is a cheering example of a court being resolute enough to follow the principle, and not merely the words, of an Act of Parliament.

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It is a popular delusion that the difficulty of deciding questions before a law court arises from the over-subtlety of lawyers and the absurd technicalities of pleaders. 'Let us,' says the plain man of common sense, 'have no pleadings, and then we shall have no quibbles.' What he overlooks is, that in ninety-nine cases out of a hundred the difficulties which harass judges arise, not from the technicality of law, but from the inherent difficulty of adjusting legal principles so as to solve questions raised by the complexity of facts. Nicety of distinctions lies in the nature of things. These are the kind of reflections suggested by the curious case, *Consolidated Co.* v. *Curtis*, '92, 1 Q. B. 495. The apparent owner of goods has, under a bill of sale, parted with the right to sell them. He hands the goods over to Curtis and Son, auctioneers, for sale. The auctioneers sell the goods. Are they guilty of an interference with the rights of the true owner, who in effect owns the goods under the bill of sale? Mr. Justice Collins holds that they are. It is quite possible that another judge might have held that the auctioneers, who knew nothing of the bill of sale, did not commit any wrong. The difficulty, however, of answering satisfactorily

the enquiry raised in the case depends at bottom, not on subtleties of pleading, but upon the difficulty of reconciling the undoubted rights of ownership, with a due regard to the rights of persons who, with completely innocent intentions, do unwittingly interfere with the rights of ownership.

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*In re Shine*, '92, 1 Q. B. (C. A.) 522, decides two points of some little interest.

First, a payment of £30 a week, due to an actor under an agreement made for two years, is either a salary or an income, and therefore comes within the Bankruptcy Act, 1883, s. 53, sub-s. 2. We confess to some little surprise that the question as to such a payment being either salary or income should have been held open to argument. It is certain that income tax would be payable upon it.

Secondly, such salary or income being gained by personal services does not *primâ facie* vest in the trustee in bankruptcy under Bankruptcy Act, 1883, s. 54. The bankrupt therefore may part with the whole or part of it, and after he has so parted with it, the Court cannot order it under the Bankruptcy Act, 1883, s. 53, sub-s. 2, to be paid to the trustee.

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*Attorney-General* v. *Gosling*, '92, 1 Q. B. 545, defeats an attempt to evade payment of account duty under 44 & 45 Vict. c. 12, s. 38. It is satisfactory to find that modern judges are becoming more and more ready to give a natural and fair interpretation even to taxing Acts. The public interest has, from time to time, suffered a good deal from the now obsolete theory that these Acts ought to be in some sense construed against the Crown, or in plain words, against the interest of the nation. The case is also curious as containing an authoritative correction of the language used in a former judgment in *Attorney-General* v. *Chapman*, '91, 2 Q. B. 526; we must now read 'probate' duty instead of 'legacy' duty. A speculative question arises, how far a Court has power in one case to correct the language of a judgment delivered in a different case.

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*The Royal College of Veterinary Surgeons* v. *Robinson*, '92, 1 Q. B. 557, reads a good lesson to persons who attempt to gain custom from an ignorant public by claiming qualifications which they do not possess. *X*, a mere shoeing smith, who does not possess qualifications required by 'a practitioner of veterinary surgery,' has for the last twenty-five years described his forge as a 'veterinary forge.' He has thereby incurred a fine under the Veterinary Surgeons Act, 1881 (44 & 45 Vict. c. 62), s. 17, sub-s. 1, for using a description which implies that he is qualified to practise as a

veterinary surgeon. That this form of imposture should be put down is satisfactory, but *X* may think it rather hard that his little pretence should bring down legal punishment in a world where politicians, professors, teachers, and others, so constantly get employment by claiming qualifications which they do not possess, yet go unpunished and unblamed.

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Will it be ever possible to put an end to the question whether a given document is a memorandum within the 4th or 17th section of the Statute of Frauds? We doubt it. The enquiry in each case is one which depends upon minute facts hardly reducible under a general principle. *Evans* v. *Hoare*, '92, 1 Q. B. 593, raises the point under a new form. *X* offers *A* employment as his clerk, and sends *A* a form of acceptance in the shape of a letter from *A* to *X*, whose name is inserted at the head of the letter. *A* signs the letter, *X* is held bound by it as by a memorandum. The decision is reasonable, but is it reasonable that the question of *X*'s liability should depend on the accident whether *X* had or had not put his name at the head of the letter? If any rising M.P. wishes to attain fame or notoriety, his most easy way of doing it is to bring forward a bill in these words: 'The Act 29 Car. II. c. 3, ss. 4 & 17 shall be and are hereby repealed.' It will be easy for an ingenious man to find arguments in favour of such a bill; it is perhaps possible, but it is not easy, to find satisfactory answers to them.

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*The Imperial Loan Co.* v. *Stone*, '91, 1 Q. B. (C. A.) 599, supplies distinct authority for a doctrine which has long been discussed by professors and teachers in law, but has not been thoroughly considered by the Court. It is this: that madness, drunkenness, and the like on the part of a promisor, do not relieve him from liability for a contract he makes, unless his incapacity be known to the promisee. The Court of Appeal have now determined that if *X* who makes a contract sets up the defence that he was insane when he made it, he must also, in order to succeed, show that at the time of the contract his insanity was known to the promisee. This decision exactly falls in with the doctrine of Professor Holland, that the validity of a contract depends not on the consent of wills, but the apparent consent of wills on the part of the contracting parties. (See Holland, Jurisprudence (5th ed.), p. 222.)

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*Henthorn* v. *Fraser*, '92, 2 Ch. (C. A.) 27 will help to clear the air as to acceptance by post. The legal puzzle was on this wise. *A* after some epistolary negotiation leaves with *B* an offer of the refusal of certain property, *B* posts an acceptance at 3 p.m. the next day. Two hours earlier *A* has written revoking his offer (having agreed to sell

to *C*), but this letter does not reach *B* till 5 p.m. Problem to find the purchaser. *Household Fire Insurance Co.* v. *Grant* (4 Ex. Div. 233) decided that in such a case the contract was complete on the posting of the acceptance, but the theory on which Baggallay and Thesiger L.JJ. proceeded was that the offerer had authorised the Post Office to receive the reply. Lord Herschell and Lindley L.J. however disclaim this view, and state the true principle thus: 'Where the circumstances are such that it must have been within the contemplation of the parties that according to the ordinary usages of mankind the post might be used as a means of communicating the acceptance of an offer, the acceptance is complete as soon as it is posted.' But what if the acceptance is never received, on Baggallay and Thesiger L.JJ.'s hypothesis this does not matter for there is a constructive delivery. Are we on the new theory to treat an offer which may be responded to by post as containing an implied agreement by the offerer to take the risk of non-delivery and dispense in that event with communication? Some such particular agreement to dispense with communication there must be as is well pointed out in the keen criticism of Bramwell L.J.'s dissenting judgment in *Household Fire Insurance Co.* v. *Grant*.

[If an offerer prescribes a mode of acceptance, he takes the risk that the mode which he has prescribed may fail to convey the answer to his mind. If he does not prescribe a mode of acceptance, the offerer may communicate his acceptance in such a manner as corresponds with 'the ordinary usages of mankind.' If this communication does not reach the offerer, who is to suffer? *Semble* the offerer. And when is the contract made? When the communication is made. *Henthorn* v. *Fraser* does but apply the rules in *Byrne* v. *van Tienhoven* and the *Household Fire Insurance Co.* v. *Grant* to the case of a written offer delivered by hand and accepted by post.—W. R. A.]

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It is old law that a surety paying the debt is entitled to all the securities which the creditor holds for it. It is quite another proposition to say that the creditor is entitled to all the securities held by the surety; yet such was the contention in *Sheffield Banking Co.* v. *Clayton* ('92, 1 Ch. 621). *Mawer* v. *Harrison* (1 Eq. C. Abr. 93) was cited, but when brought to light the supposed authority, mummy-like, crumbled into dust. Such counter-securities go only to swell the surety's assets, though in doing so they indirectly benefit the creditor. That is all. Apart from the point of law what is gratifying and a matter of legitimate pride to English lawyers is to see the patience, the research, the thoroughness with which a point like this is threshed out by our judges, the original records sent for and searched and no pains spared.

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*Archer's* case ('92, 1 Ch., C.A., 322) is, as the author of Erewhon would express it, a 'straightener' for the morals of directors. Bribery is Protean in its forms. In *Archer's* case it took the shape of an agreement by a promoter to buy back at par a person's qualification shares if he would become a director. This kind of indemnity is of course a thing of value. In *Archer's* case it proved worth exactly £500, and for this the director was on the plainest principles of agency, accountable to the company, but this sum is by no means the measure of the wrong done to the company by such a clandestine agreement. The object of a qualification clause in articles is to secure a director having a substantial stake in the company and so guaranteeing his *bonâ fides*. Such an agreement as Archer's entirely nullifies the benefit of such a provision. It enables a director to pose as having an ostensible without any real stake in the welfare of the company and to betray its interests with unconcern. A really more difficult question of law was raised by the *Marquis of Bute's* case ('92, 2 Ch. 100), viz. how far a President of a Savings Bank who does not attend the meetings of the directors is liable for the neglect of the rules. Stirling J. took a lenient view. A director is not bound to attend every board meeting (*Perry's* case, 34 L. T. R. 716), but as Lord Hardwicke observed (*Charitable Corporation* v. *Sutton*, 2 Atk. 405), 'If some persons are guilty of gross non-attendance and leave the management entirely to others they may be guilty by this means of the breaches of trust that are committed by others.' It is this culpable laches which facilitates so many frauds by trustees as well as directors.

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Since *Re Almada and Tirito* (38 Ch. Div. 415) the worlds of law and commerce have been aware that a limited company cannot issue its shares at a discount, but it is satisfactory to have the matter set at rest once for all by the authority of the House of Lords (*Ooregum Gold Mining Co. of India* v. *Roper*, '92, A. C. 125). The principle at stake—and there could hardly be a more vital one—was whether a company's capital is to be a reality or a sham. In the *Ooregum* case everything was *bonâ fide*; but would this always be so? Not unless promoters' morals should undergo an entire transformation. The inviolability of a company's capital, as Giffard L.J. once said, is the price of the privilege of limited liability. For joint stock companies it is the keystone of stability and success.

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A retailer of goods bearing a pirated trade mark is technically an infringer and as such liable to an action for an injunction without any previous warning. The late Master of the Rolls, we have it on the authority of Chitty J., used when at the bar to advise his

clients in such cases to give no notice but move at once, and there may be, nay, must be, therefore good reasons at times for doing so; but when, as in *American Tobacco Co.* v. *Guest* ('92, 1 Ch. 630), it is a trumpery case of a few packets of cigarettes worth 17*s.* 6*d.* in the hands of an innocent retailer willing to make all amends, the issue of a writ without warning is a litigious act which the Court may well discourage by giving no costs. The proper persons to sue are those who place the spurious goods on the market. 'This sort of thing,' said Bramwell B., speaking of issuing execution the moment after judgment, 'is regulated by good feeling.' The Court has now, to supplement good feeling, a most wholesome discipline of costs and may thereby express a very effective opinion on the merits of an action. *Shoppee* v. *Nathan & Co.* ('92, 1 Q. B. 245), where a sheriff's officer was sued for a trifling and unintentional error of his clerk, is an example of an action which has no merits at all.

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The law of slander is not quite so illogical as the Court of Appeal in *Alexander* v. *Jenkins* ('92, 1 Q. B., C. A., 797) seem to think. The test in all such cases is, does the slander 'touch the plaintiff in his office, profession or trade'? A charge of drunkenness against a beneficed clergyman of course does; he runs the risk of deprivation. So against a schoolmaster, it loses him pupils or his post: not so against a town councillor, for drunkenness would be no ground for removing him as unfit (at all events it was none in *Alexander* v. *Jenkins*), and removal in the case of an office not of profit is the only damage which our unsentimental law can regard. An imputation of drunkenness would now 'touch' anybody whether in office or not, but the Common Law crystallized in a pre-temperance age, an age when excess in drinking was not only no disqualification for an office, but like swearing and other accomplishments the mark of a gentleman. 'Agh,' exclaimed a Highland attendant, 'its sare changed times at Castle Grant when gentlemens can gang to bed on their ain feet.' Times may be 'sare changed' but the law still savours of the good old times. If it is to be brought into line with modern sentiment, the Legislature must intervene as it has done in the case of words imputing unchastity to a woman.

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If *Ex parte Hopkins* (61 L. J. Q. B. 240) has for the moment defeated the ends of University discipline, it is consolatory to feel that it has been the means of exhibiting to great advantage the admirable wisdom and impartiality of our law. No judge, not even the Vice-Chancellor of a University, exercising a criminal

jurisdiction, can try anyone unless they first charge the person and give him or her the opportunity of pleading to the charge. This is elementary law, not to say justice, but it was not attended to in *Daisy Hopkins'* case. This young person was not charged at all, that is to say, charged with any offence known to the law. 'If,' says Falstaff, 'it be a sin to be fat and merry, God help the wicked,' and if 'walking with an undergraduate' means consignment to the Spinning House, such construction would eclipse the gaiety of the 'Eights' or 'Commem.' Euphemisms are favoured by the fastidious taste of academic life, and everybody concerned knew quite well what 'walking with an undergraduate' meant. But when it comes to bread and water for a fortnight in a University gaol, on the strength of a *double entendre* we recognise the desirability of charging an offence with something like explicitness even at the risk of being prosaic.

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It is a reasonable rule that a mortgagor wanting to pay off the debt should pay six months' interest in lieu of notice: for the mortgagee ought to have time to find a new security. It applies (as why should it not) though the subject of the mortgage is a reversionary interest (*Smith* v. *Smith*, 40 W. R. 32), but it ought not to apply and does not apply, so Chitty J. has held (*Fitzgerald's Trustees* v. *Mellersh*, '92, 1 Ch. 385), to an equitable mortgage by deposit. Such mortgages are now very common for securing a temporary loan from bankers. This differentiates them from the permanent investment contemplated by a legal mortgage and displaces the ordinary implication. To make them irredeemable, except on six months' notice, would very much hamper business. A tender by a mortgagor under protest, it may be noted, is good (*Greenwood* v. *Sutcliffe*, '92, 1 Ch., C. A., 1), though a conditional tender is not.

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*National Building Society* v. *Raper* ('92, 1 Ch. 54) is also of some interest on a point of foreclosure practice. When a mortgagor makes default in redeeming on the day fixed by the foreclosure judgment the mortgagee has become or is entitled to become the absolute owner, and therefore his receiving rents after that date ought not to prevent his getting an order for final foreclosure, though the affidavit of default may not have been sworn till after receipt of the rents. This is the common sense view of the matter, adopted by Chitty J. Repeatedly reopening the account would lead to a puzzle like that of Achilles and the tortoise. The mortgagee would never overtake the mortgagor.

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Libel or no libel, according to the most recent cases, is a question of evidence, generally for a jury, and the Court should not prejudge

it by granting an interlocutory injunction; but it would be a very unfortunate thing if the Court could not restrain an impudent trade libel like that in *Collard* v. *Marshall* ('92, 1 Ch. 571). When persons are parading in front of a man's place of business with offensive placards falsely calling him a sweater and other bad names, damages at a distant date are a very inadequate remedy. The plaintiff says 'I want this thing stopped,' and an interlocutory injunction alone can do this. Promptness of redress is one merit of an injunction, another is the negative mode it affords of enforcing specific performance—witness *Ryan* v. *Mutual Tontine Westminster Chambers Association* ('92, 1 Ch. 427), where a 'top flat,' having stipulated for a resident male porter, objected to having the door opened for visitors by a charwoman or boy in shirt sleeves, and sought an injunction to restrain the landlord from furnishing such inadequate substitutes. It was what the late Lord Bramwell would call a 'desperate point' to demur to the jurisdiction on the ground that it would be enforcing specific performance of a contract for personal services. Making people work together is one thing: making a landlord provide a porter is another. It is no more a personal service than making him provide a coal scuttle or a door mat.

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'The Council' (of Law Reporting), said Lindley L.J. (1 L. Q. R. 147), 'should leave no effort unspared to make its Digest as perfect as possible.' This advice the Council has evidently followed, and it is to be congratulated on the latest result achieved. Some idea of the magnitude of the work is conveyed by the fact that the type employed on it weighed twenty-two tons, while the Table of Cases alone fills over 500 pages. The alphabetical arrangement by titles has been adhered to, and has been more thoroughly carried out in the sub-titles. This is right. An alphabetical arrangement pure and simple would be chaos, but combined with the arrangement by titles and sub-titles it is far the best. The titles make the arrangement scientific, and the alphabetical order makes it easy of reference. Another improvement is that a very considerable body of statute law has been incorporated. When, as in these days, statute law enters so largely into every branch of our law, this combination of case and statute law very much enhances the value of a digest: nor is it any sacrilege thus to distribute the sections of an Act. If the scheme of the Act or the context of a scheme is material, the Act itself can always be turned to.

Yet we still desire to see a greater conciseness in the statement of cases. They are classified head-notes of the Reports rather than propositions of law. This is a matter which has more than once been

the subject of comment in this REVIEW. What the profession wants, as Lindley L.J. has said, is law, the 'legal pith' of a case and the legal pith only. Anything more than this incumbers the book and fatigues the inquirer. It is not worth while in a digest to set out a case with any fullness, because no conscientious lawyer can rely on a case in a digest. He must go to the report itself. Smelting the ore is doubtless very hard work, but it is of the essence of a good digest.

The titles and sub-titles are mostly well-chosen, and the arrangement of matter under each judicious, but there are still some anomalies. Thus 'Employer's Liability' should come under Master and Servant, 'Restraint of Trade' under Contract, 'Oath' under Evidence. 'Mischievous Animal' is not a good title. If we have 'Sale of Goods' as a title it would be better to put Sale of Land with it under a general title 'Sale' than under a separate title 'Vendor and Purchaser.' Why, again, should not the decisions in the Weekly Notes, not afterwards appearing in the Reports, be incorporated? They are frequently of value on points of practice.

On the whole the new Law Reports Digest marks a great advance, and if the Council follows up its improvements we shall at no distant day get what is destined to be the most useful law book of the future, an ideal digest.

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And yet the vagaries of the 'Law Reports' in the choice of cases seem uncontrollable. If ever there was an unreportable case in any Court it is that of *Hall* v. *Hall*, in which the Court of Appeal have unanimously affirmed the decision of Lord Justice Fry, sitting as a judge of first instance. The case is reported in the 'Law Reports,' '91, 3 Ch. 389, and '92, 1 Ch. 361, occupying in all thirteen pages. It was a case upon the proper construction of a very peculiar will, very inartificially drawn by a commercial traveller. Lord Justice Kay said in terms that the construction would, in his opinion, lay down no canon to guide in the construction of another will, unless another will should be made in identical language. This is a thing which is hardly within the range of possibility. In the face of this remark the case is fully reported in each stage, thus adding a substantial weight to the burden under which subscribers to the 'Law Reports' groan. The initials responsible for the case are H. C. J., and in the Court of Appeal M. W. Where is the editorial power? Why should subscribers be laden with three volumes of Chancery decisions every year when cases of this type might be ignored? The strongest reporters who ever worked on the Law Reports are responsible for the thinnest volumes in the Exchequer and Exchequer Division.

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One has a difficulty in perceiving what is gained by reporting the case of *Claridge* v. *South Staffordshire Tramway Co.*, '92, 1 Q. B. 422 (the May number). Can there possibly be any doubt of the difference between the proposition that a bailee may maintain an action for injury to the chattel by negligence, equally with the bailor, and the proposition that he can recover the same amount of damages that the bailor is entitled to? Perhaps the report, and even the appeal itself, may be due to a confused recollection of the point discussed in *Johnson* v. *Lancashire & Yorkshire Railway Co.* 3 C. P. D. 499.

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We should be leaving a pleasant duty unperformed did we not draw the attention of English lawyers to a series of admirable articles in the Harvard Law Review written by Mr. J. B. Thayer. He is tracing the history of trial by jury and the history of the law of evidence, and is bringing to light many things that have escaped the eye of earlier explorers. He shares with his colleague, Mr. J. B. Ames, a mastery of the Year Books which must be very rare even on the American side of the Atlantic. The Harvard Law Review is rapidly making itself an absolutely indispensable member of the library of every one who has any care for the history of the common law.

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Among recent additions to the materials for English legal history we must notice 'Three Early Assize Rolls for the County of Northumberland,' edited by Mr. William Page and issued by the Surtees Society. The Surtees is constantly proving itself to be the most enlightened of all our local antiquarian societies. On this occasion it has published among its subscribers three judicial rolls of the thirteenth century which are full of interesting and valuable cases, and which should be read by many who are not Northumbrians. In his preface Mr. Page pleads that he is a beginner. He has made an excellent beginning.

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*It seems convenient to repeat in a conspicuous place that it is not desirable to send MS. on approval without previous communication with the Editor, except in very special circumstances; and that the Editor, except as aforesaid, cannot be in any way answerable for MSS. so sent.*

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## CRIMINAL PROCEDURE IN FRANCE.

RECENT events have brought prominently before the notice of the British public the manner in which people are arrested and the charges against them investigated in France, and I purpose in this paper to give a short sketch of criminal procedure in that country.

To go minutely into the very complicated provisions of the law on this subject and describe the varied attributes and powers of the numerous functionaries who compose what is called in France 'la police judiciaire' would be probably both too long and too technical to interest even professional readers. I shall therefore merely attempt here to give an outline of the main features of a criminal investigation in France. Let us suppose that a man is accused of a crime in that country either by a verbal accusation to a passing policeman, as in the case of the two Englishmen which not long ago created so considerable a sensation, or by a formal and written communication to the Procureur de la République, or Public Prosecutor. The judicial machine has now been set in motion; let us see how the matter is conducted, following the affair through its various stages until it reaches the Cour d'Assises. A charge made in the public street to a policeman on duty being a matter of everyday occurrence to which any one may be subjected without warning, it will perhaps be more convenient to start from this point. The accused person is taken into custody, let us suppose, on the Place de l'Opéra or the Boulevard des Italiens. The first step is to take him to the nearest Commissariat de Police. If the Commissaire is at the police station at the time he will be interviewed at once, but the duties of that important functionary being extremely manifold he is not unlikely to be out, in which case the accused person will of course be detained till his return. Having been rapidly examined by the Commissary, the evidence of the accuser and of the policeman having been taken down in writing, the accused person will probably be told that the charges against him are very grave and that the 'dossier' (the case) will be immediately sent to the Public Prosecutor and the Juge d'instruction. It is this latter personage in whose hands is placed in practice the sole conduct of every criminal case, and his powers are enormous. The

accused person is detained as a matter of course at the 'Poste' or lock-up till the wishes of the Juge d'instruction are ascertained. This magistrate—who is one of the Judges of the Tribunal of the locality, nominated to the functions of a Juge d'instruction for three years with the possibility of continuance at the end of that period—will issue a 'mandat de comparution,' ordering the accused person to be brought before him if such person is already in custody. Otherwise he issues a 'mandat d'amener,' which is equivalent to our magistrate's warrant. The prisoner is then brought before him, as a rule pretty promptly, in his private room at the Palace of Justice. And now begins that system of criminal procedure initiated in France but now common to most other countries in Europe, which is so utterly foreign to the English notion of criminal law and justice that an Englishman who is not acquainted with it has great difficulty in believing it to be true, while those who know it well seldom become reconciled to its extraordinary methods. The whole aim and object of the procedure is, as soon as the authorities become convinced of the prisoner's guilt—a conviction at which they frequently arrive with unwarrantable haste—to force that unhappy individual to confess his sins. Physical torture has been abolished, as most people are aware, for some time in criminal procedure, but it is doubtful whether the rack and the thumbscrew were much harder to bear than the mental torture to which prisoners are subjected in France from their first interview with the Juge d'instruction to the close of their trial at the Cour d'Assises. For unfortunately and almost inevitably with men whose functions are exclusively criminal and who are daily in the habit of employing these peculiar methods for extracting the truth, the Juge d'instruction has almost always a more or less well-defined bias against the prisoner. In the case we have supposed, he will have read the depositions of the accuser, the policeman, and the commissary of police before he sees the prisoner. Then the 'interrogatoire' begins. It is directed more usually than not and more or less to the knowledge of the Juge d'instruction himself to prove that the prisoner is guilty of the offence of which he is charged. The accusation is *prima facie* true—this, I mean, is the often unconscious idea in the mind of the Juge d'instruction—and everything alleged by the prisoner in his defence must be most carefully verified. Let it be noted, moreover, that the accused person has to grapple singlehanded with the Judge, the police, and the accuser. He is not allowed any professional advice, and everything he says or omits to say will be used against him to the utmost advantage. There is a law at present under discussion for permitting the prisoner to be assisted by counsel during his ex-

amination by the Juge d'instruction, but it has been under discussion for several years now and has not yet become law.

At the close of several hours of cross-questioning of this kind the magistrate issues a 'mandat de dépôt' if he thinks there is a *primâ facie* case against the prisoner, and the latter is incarcerated for the present. This is one of the enormous powers before alluded to of the Juge d'instruction.

By virtue of this 'mandat de dépôt' the prisoner can be kept in custody for months, being brought up from time to time for fresh interviews with the Juge d'instruction, when the same harrying, bullying, and badgering is renewed, 'pour amener des aveux!' There is no effective means of checking this power. The Juge d'instruction is nominally under the control of the Procureur Général and the Courts of Appeal, but neither one nor the other ever interfere with the discretion of the Judge in this matter.

The prisoner may be liberated on bail by the Judge in criminal cases, and for misdemeanours punishable with less than two years' imprisonment liberty on bail may be demanded as a right five days after the first examination for all persons domiciled in the locality—a provision which of course generally puts foreigners out of court. If the Judge refuses bail the prisoner can appeal from prison to the Chambre des mises en accusation, a branch of the Court of Appeal—this is the nearest approach to our Habeas Corpus—but he will have to make out an overwhelmingly strong case to induce that Court to interfere with the Judge. Practically, as was before stated, the Juge d'instruction is supreme.

Let us now suppose that the preliminary investigation known to French law as 'l'instruction' is terminated, and the Judge has rendered an 'ordonnance de renvoi,' that is an order that the case be tried—the committal for trial of our magistrates.

The Procureur-Général—the head of the department of public prosecution who is kept informed of every affair by the Judge of instruction—is officially apprised of the termination of the investigation, and of the decision of the Juge d'instruction. If the charge is a mere misdemeanour the case goes before the 'Tribunal de police correctionnelle,' a court composed of three judges without a jury. But it will be more interesting to suppose that the matter in question is a crime. In that case it will be sent before the Cour d'Assises, where there are three judges of the Court of Appeal and a jury. But there is a preliminary step in this event. The whole case, together with all the evidence and the judges' notes, is sent to the 'Chambre des mises en accusation,' which proceeds to a more or less cursory examination of the affair; but it is extremely rare that it comes to a different conclusion to the

one arrived at by the Juge d'instruction. It accordingly confirms, in the vast majority of cases, that magistrate's decision, and the case is set down for trial at the next sessions of the Cour d'Assises.

By this time the prisoner has frequently been in custody six months or longer, and by the time he emerges from the gloom of his prison into the glare of the Assise Court he is more like a hunted animal than a human being. But torturing in the extreme as have been his numerous interviews with the Juge d'instruction and other incidents of the investigation, such as, in murder cases, the horrible 'confrontation' with the corpse of the victim with which he is brought unexpectedly face to face, so that the Juge d'instruction, the detectives and the Public Prosecutor, who is generally present on these occasions, may note upon the face of the shrinking, cowering wretch before them the outward signs of his guilt—inexpressibly torturing as must have been all these incidents of the investigation, the last stage is by far the most terrible ordeal of all.

Anybody who, like the present writer, has seen a miserable French criminal in a murder trial seated between two stalwart gendarmes in the dock of the Paris Cour d'Assises, the bright red robes of the Judges and the Ministère Public standing out vividly in the otherwise 'dim religious light' of that gloomy chamber of horrors, and watched him fight for his life in desperate verbal encounters with the President, and his miserable attempts to cross-examine the witnesses, generally degenerating into virulent abuse, has witnessed a spectacle of a very unedifying nature which he is not likely to forget. The rôle of the President of the Court is the most remarkable part of a French criminal trial. Theoretically he is supposed to be quite impartial, and to keep the balance between the Ministère Public, that is the prosecution, on the one hand, and the prisoner on the other. Practically he does nothing of the kind. In proof of this last observation I may quote the following passage from the 'Gil Blas' of Jan. 1st, 1891:—

'The impartiality of the President seems to me an absolute farce. It is agreed on all hands that the President ought to be impartial, and no one dares to assert that in reality he is not. The following dialogue is a fair specimen of what regularly takes place at every session of the Assise Court. When the President has gone too far—and Heaven alone knows what constitutes going too far!—the counsel for the defence objects. Thereupon the President sits up in his chair, adjusts his pince-nez, and scornfully replies, "I suppose, Maître So and So, you don't doubt the impartiality of the President?" Counsel hastens to protest that such an idea never entered his head; and the President triumphs—naturally. Were

the barrister to make any further objection he knows only too well the penalty—withdrawal of his right to address the Court, suspension from his functions, and not improbably a prosecution for insulting the magistracy. It is the old story of the man brandishing a big stick in the face of his child and exclaiming, "If you don't say I'm the best of fathers I'll whop you within an inch of your life. . . . And now, what do you think of me?"'

The usual line of the President's examination of the prisoner (known as the 'interrogatoire') consists simply in a series of statements much in the following manner:—

'President.—On the 27th of March you returned home late at night?

'Prisoner.—It's false! I never went home on that night.

'President.—Silence! Don't add to your crimes by fresh lies. I say you went home,' &c.

Frequently the President takes no notice whatever of the prisoner's replies, but pursues his course of statements with unruffled composure. At the close of this examination—which is a matter with which the Judge and the prisoner are solely concerned, without any intervention of counsel, and which in the case of a clever prisoner, fighting with more energy and hope of success than most of them display, frequently resolves itself into a very sharp intellectual tussle—comes the examination of the witnesses. This too is conducted almost entirely without the assistance of the 'avocats.' The witness advances to the bar, which is simply a rail in the middle of the court, gives his name, age, &c., swears to speak the truth by holding up his right hand, and then receives from the President the injunction 'Dites ce que vous savez' (Tell us what you know), which he then proceeds to do, generally in a very garbled and more or less unintelligible manner. Everything is evidence for what it is worth, hearsay opinion, and the wildest flights of a disordered imagination.

Counsel for the prisoner may ask any questions on obtaining permission from the President, but anything like systematic and artistic cross-examination is unknown in France. Then the Avocat or Procureur-Général addresses the jury. This is called the 'réquisitoire,' and is generally an impassioned appeal to the jury, in which the case is put in the blackest possible light for the prisoner, and the jury are asked to convict him of the gravest charge in the indictment. The Public Prosecutor takes little part in the trial until this speech, though he may intervene at any moment, and not unfrequently apostrophises the prisoner, as when in the recent trial of an officer on a charge of murder the latter

was seen to smile at one of the depositions, whereupon the Avocat Général exclaimed, 'Vous riez, misérable, mais vous ne rirez pas sur l'échafaud!'

The most important part of his rôle, however, is not his speech in court, but the drafting of the indictment, or 'acte d'accusation,' with the reading of which by the Greffier or Clerk of the Court the proceedings are opened. The compilation of this document is the work of the Department of Public Prosecution, and it is indeed a work of art, being a history from the point of view of the prosecution not only of the crime in question, but of the entire antecedents of the prisoner, often from his infancy, in which every conceivable circumstance that can be raked up against him is duly chronicled in the most damning colours, any former sentences set forth, and everything possible done to influence the minds of the jury adversely to the prisoner.

The 'réquisitoire' ended, if there is a 'partie civile,' the counsel of that party addresses the jury. A 'partie civile' is any person injured by the crime who demands damages—if only to the extent of one franc—in consequence thereof. To constitute oneself 'partie civile' is moreover a method often employed in order to obtain a *locus standi* in the case when it is desired to be able to refute accusations which the prisoner's counsel is thought likely to make in the course of the case.

After the speech for the 'partie civile' comes the turn of the counsel for the defence, who in a French trial always has the last word. Then the questions are put to the jury by the President. There is no summing up since 1881, when the President's résumé was abolished as being calculated to interfere with the free exercise of their discretion by the jury.

The questions which the jury have to answer are often exceedingly numerous. I have known as many as eighty-seven questions left to a French jury. Fortunately, they are not obliged to be unanimous; a simple majority is sufficient. The functions of a French jury are quite different to those of our own twelve 'good men and true,' and if space permitted it would be interesting to compare and contrast their respective duties. It must suffice, however, to mention here two of the most notable differences. In the first place French juries are more than judges of fact, inasmuch as their discretionary power is practically unlimited. Suppose a murder proved beyond the possibility of a doubt, the murderer being taken red-handed. An English jury could not possibly acquit, for all they are asked is, 'Did the prisoner commit murder on such and such a date in such and such a manner?' But the question left to a French jury is much wider, for though in terms

it is only, 'Un tel est-il coupable d'avoir, &c.,' it is accepted as meaning not only 'Did he actually do the act?' but further, 'Is he in your opinion morally guilty for having done it?' Consequently, if the jury can conscientiously reply to the latter question in the negative, they acquit the prisoner; and that happens every day, as every one who reads the newspapers must be aware.

The second peculiarity of a French jury is its power of according 'extenuating circumstances,' and their abuse of that power is one of the most noticeable features of French criminal trials. Extenuating circumstances are given to prisoners every day who have committed the most revolting crimes under the most appalling circumstances and without the shadow of an excuse or mitigation. The legal effect is to deprive the Court of the power to condemn the prisoner to death, and to give it the faculty of descending two degrees in the scale of penalties. Thus a man indicted for murder and found guilty 'avec circonstances atténuantes' *can* only be condemned to penal servitude for life, and *may* only be condemned to penal servitude for five years. The fact is that a vast quantity of Frenchmen are strenuously opposed to the infliction of the death penalty under any circumstances whatever, and by according extenuating circumstances they do no more than register a protest. But it is none the less a flagrant misuse of the power entrusted to them by the law.

The trial being terminated and the prisoner, let us suppose, condemned to death, as does occasionally happen when the panel happens to be fairly devoid of crotchety fanatics, there is always an appeal to the Court of Cassation. As the establishment of a Court of Criminal Appeal in this country is one of the questions of the hour, it may be as well to say a word about the criminal jurisdiction of the Supreme Court of France. As an appeal is made to that Court almost as a matter of course whenever a man is condemned to death by an Assize Court, it is sometimes supposed that the Supreme Court has power to retry the case. Such however is not the case. The Court of Cassation has merely power to quash the sentence of any Court when any formality prescribed by law, on pain of nullity of the proceedings, has been neglected, and as in a criminal trial these formalities are extremely numerous and minute in almost every trial it is possible to discover some more or less trifling deviation from the prescribed forms upon which to found an appeal to the Court of Cassation. But only about one out of six of such appeals is successful. When, however, it does succeed, the Supreme Court sends the affair for trial to the next sessions of another Assize Court, and the whole case has to be tried *de novo*.

From the above sketch of criminal procedure in France it will, I hope, be seen how very different is that procedure from our own. Here the prisoner is never questioned by the Judge nor allowed to interrogate the witnesses; indeed it has only recently become the fashion for prisoners to make statements, not on oath, and the desirability of such statements is a much disputed point among criminal lawyers. Here the prosecution always conducts the case against the prisoner with studied moderation instead of fulminating against him and urging the jury to show him no mercy, a proceeding which usually defeats its own object and has a diametrically opposite effect. Here the Judge sums up the case carefully to the jury, his long experience in sifting evidence enabling him to indicate to them in which direction it tends, though the difference in the functions of the two juries which I have endeavoured to point out would certainly render any such summing up of the evidence as obtains in our Courts of very little value to a French jury. Finally the discretion of the Judge as to the punishment to be inflicted is infinitely greater here than in France, and necessarily so, where the power of the jury is so much more circumscribed.

I have often heard it stated—indeed it was gravely affirmed quite recently in a leading article of one of our best known morning dailies—that whereas in England a prisoner is deemed to be innocent until his guilt is proved, in France he is presumed to be guilty until he has demonstrated his innocence. There is not a shadow of foundation for such a statement in law, and a French lawyer would be aghast at the enunciation of such a proposition. But from a practical point of view the assertion is not wholly unwarranted. For though theoretically the burden of proving the guilt of the prisoner is always on the 'parquet' or public prosecuting department, yet in practice the habit of endeavouring to force a prisoner to confess—a proceeding which is so opposed to the spirit of our own procedure that English law, as is well known, makes any confession so obtained incapable of being given in evidence—has the effect of tending to warp the judgment of the persons engaged in France in the investigation of crime, while on the other hand the lengthy enquiry by the Juge d'instruction with all its 'confrontations,' 'reconstitutions de la scène du crime,' &c., &c., has the effect, unavowed no doubt, but nevertheless often observable, of prejudicing the prisoner who is eventually sent for trial before them in the eyes of the Judges of the Cour d'Assises.

Such, roughly speaking, is criminal procedure in France, and it is by no means devoid of its good points.

There is no doubt that our own procedure errs in two particulars

wherein the French system is much more rational. First, in our almost morbid horror of inducing the prisoner to say anything 'which may be used against him at his trial,' whereby there is small doubt that the guilty often escape without any adequate corresponding advantage to the innocent. Secondly, in the extremely complicated and often unreasonable nature of our highly technical rules of evidence, whereby information which is really relevant is frequently rendered inadmissible in evidence. However, there will not probably be among English readers two opinions as to which system is on the whole best calculated to ensure at once the discovery of the truth in any given enquiry and in general a humane and enlightened administration of justice.

MALCOLM MᶜILWRAITH.

## *SMITH* v. *BAKER* AND *VOLENTI NON FIT INJURIA.*

THE short point for decision by the House of Lords in the recent case of *Smith* v. *Baker and Sons*[1] was, whether, when the plaintiff had admitted his knowledge of a risk which ultimately brought injury to him, the judge ought to have nonsuited, and not to have allowed the case to go to the jury. It is proposed to shew that the decision of the House of Lords, holding that the case was rightly left to the jury, was inevitable in view of established principles of law and the way in which this particular case was presented to the House, while at the same time much of the reasoning by which the result was attained is extremely unsatisfactory.

At the outset, however, of some remarks, which may not strictly be confined to mere thankfulness and laudation, it is possibly not too venturous to anticipate that, notwithstanding the substantial harmony of the result with the course of preceding decisions, the case will not give complete satisfaction; either to those who look at it otherwise than as the means of securing payment, to a probably very deserving man, of a sum in satisfaction of very severe hurts received whilst doing his master's business; or to those whose ideal of a decision in the House of Lords is one of the closely reasoned demonstrations that make the L. R. H. L. series such stimulating reading for a lawyer.

In *Smith* v. *Baker*, the workman's engagement was at work in full view of the risk from which he months after received his injury. Two months previous to the accident he was put to the work itself to which the risk was attached, and worked on at it without complaint till he was injured. It may be mentioned that Lord Watson notes that 'one at least of his fellow workmen had previously complained to the foreman of the danger;' though there is no suggestion that it was with the plaintiff's authorization or concurrence. The comment of the ordinary observer without prejudices in the matter of the liability of master to servant on the facts proved in *Smith* v. *Baker* would probably be that, if ever there could be a case of a man working with his eyes open and taking the risks of his work, this particular case of *Smith* v. *Baker* is that case. The ways of juries, however, with Railway Companies, newspapers, and employers, presumptively wealthy, are uniform; and as a learned judge, whose decisions have helped as much as any

[1] (1891) A. C. 325.

to consolidate the prerogative of juries to mete out compensation on philanthropic principles very lately observed, 'In a case under The Employers' Liability Act there is no chance of an employer getting a verdict.'

Again, to a student of law who has studied the House of Lords' Reports of the last twenty years the perusal of the various opinions delivered in this case by the Law Lords may not unlikely suggest the reflection, what an immense and irreparable loss the House suffered when Lord Cairns ceased to attend and mould its judicial deliberations. Compare for example Lord Cairns's leading opinion in *Wilson* v. *Merry*[1]—an exposition which has been submitted to an altogether exceptional mass of adverse criticism, and which is by no means an adequate specimen of his method and powers, but which has certain analogies with the present case—with any of the opinions delivered in *Smith* v. *Baker*. There is, first, the statement of facts; then a precise enunciation of the general principle of law applicable in every relevant aspect; lastly, the points in which the case before him failed to meet the requirements of the principle are distinctly and unambiguously pointed out; and pervading the whole there is a rigid elimination of any expression of opinion on matter not necessary for the decision, while every sentence converges on the point to be decided without ambiguity and with the precision of a scientific formulary. On the other hand, in *Smith* v. *Baker*—surely a case admitting one way or the other of an enunciation of broad principle—in the leading opinions there is apparently not even an effort to state any. 'In the circumstances of this case,' says Lord Watson[2], 'the question whether he had accepted the risk is one of fact; there is no arbitrary rule of law which decides it.'

There is again a wealth of unnecessary dicta; for example, the Lord Chancellor's theory about 'consent to the particular thing done,' which is wholly unnecessary for the decision. With this compare Lord Cairns's[3]: 'Your Lordships will probably not express any opinion as to whether in some other stage of this action such an argument may, or may not, be maintained; and I only notice it at present in order to shew that it has not been overlooked.' As a final Court of Appeal the function of the House of Lords is to set at rest disputed points, not to stir up or suggest points for disputation.

Lord Herschell's suggestions too about *Thomas* v. *Quartermaine* appear to be altogether apart from any point raised in the case (or, if they are pertinent to any, the rest of the learned lords must have been at sea in their views of the case), and instead

[1] L. R. 1 Sc. Ap. 32. [2] (1891) A. C. at 357.
[3] *Wilson* v. *Merry*, L. R. 1 Sc. Ap. 326.

of preventing litigation, will be regarded as giving at least Lord Herschell's sanction to embarking on it. Moreover there runs through all the opinions, excepting Lord Bramwell's and Lord Morris's, a generality of expression applicable possibly to any case, or may be to no case. For example, take this passage: 'I must say for my part that in any case in which it was alleged that such a special contract as that suggested' (i. e. an agreement 'to undertake the risk arising from the alleged breach of duty,' and 'conclusively established') 'had been entered into I should require to have it clearly shewn that the employed had brought home to his mind the nature of the risk he was undertaking and that the accident to him arose from a danger both foreseen and appreciated[1].' That is, a special contract, possibly in writing, being 'conclusively established,' the rule of evidence is similar to that sometimes regarded as special to the case of money-lenders dealing with expectant heirs. To what extent then does this eversion of the ordinary onus of proof go? Is it limited to miners and factory hands, or are seamen included? Has it any and what limitations? A proposition of enormous extent is advanced and without the faintest attempt to define its application. In Lord Cairns's days the opinions delivered in the House of Lords moved on an altogether other plane.

Before proceeding to the consideration of the signification of the maxim *Volenti non fit injuria*, it may be well to point out that the cases cited of *Sword* v. *Cameron*[2] and *Bartonshill Coal Company* v. *Maguire*[3] were by no means conclusive of the defendant's liability. Those cases, in the view of the Lord Chancellor[4], 'established conclusively the point . . . that a negligent system or a negligent mode of using perfectly sound machinery may make the employer liable.' But it was quite consistent with the defendants' case to admit as much; what they said was in effect—even assuming we have not done all we ought, you have made a contract with us to release us from liability in that particular. The point for the defendants might be put 'admitting default of duty on our part you have agreed not to take advantage of it.' In that case *Sword* v. *Cameron* would merely establish a stage in the defendants' liability and not conclude it. To conclude it would necessarily be to decide whether in any circumstances the free will of the plaintiff could in law be held to assent to such an undertaking; and secondly, whether the facts proved in the case before the court did shew such assent.

But the main interest in the decision is the light that can be

[1] Per Lord Herschell at p. 363.
[2] 1 D. 493.
[3] 3 Macq. 266.
[4] (1891), A. C. 339.

extracted from it as to the true legal bearings of the maxim *Volenti non fit injuria*. There is no peculiarity in the nature of the maxim *Volenti non fit injuria* which generically distinguishes it from other legal maxims. Legal maxims are the expression of legal presumptions in the circumstances to which they are applicable. As a rule their application may be rebutted; but sometimes, though rarely, they are irrebuttable. This particular maxim embodies what is at once a legal and a philosophical truth, that what a man consents to that he cannot complain of; and admitting that a good foundation is laid for its application no objection appears ever to have been made to its intrinsic justice. The disputes which have arisen with regard to it have been mainly disputes as to the definition of the word *volens*; What goes to the making a willing or consenting person?

Two main views have been urged: first, that consent to the undertaking of a risk is to be presumed from the fact of working in the circumstances of risk—that a man is presumptively *volens* who is found working in circumstances of risk; and second, that working in circumstances of risk is no more than an element in the consideration of whether there is consent to the undertaking of the risk—that a man working in circumstances of risk is not presumptively *volens*, but invites further evidence that he is so. Both these views are in certain circumstances right, though neither can be asserted as an exclusive principle. The difficulties found in settling the rule applicable in any particular case have arisen mainly from the want of recognition, by those urging either of these views, that there is an appropriate place for the assertion of their own principle, without denying validity to what they are pleased to view—but wrongly—as an antagonist principle and which is in truth merely a supplementary one. A discussion may perhaps elucidate what the true line of demarcation is.

In considering the classes of cases to which the maxim is applicable the rudimentary distinction must be borne in mind between the case of a workman expressly engaging to do dangerous work, and the case of a workman not expressly engaging to do dangerous work, but the circumstances of whose continued working in a dangerous environment may warrant the inference that he has engaged himself to encounter the dangers incident to his employment. In the former case—to use the language of Lord Herschell in *Smith* v. *Baker* [1]—'a person who is engaged to perform a dangerous operation takes upon himself the risk incident thereto.' If there is an agreement to encounter a risk, such agreement is legally valid,

[1] (1891) A. C. 325 at p. 360 of the reports in the Law Reports.

and not the less valid because there are circumstances of danger greater than are necessarily involved. As Lord Bramwell says, 'Acrobats daily incur fearful dangers, lion tamers and the like;' but the difficulty arises where the acceptance of risk is not matter of positive agreement, but of inference from conduct only.

This latter class of cases is also susceptible of a twofold division. Those cases where the right of action in respect of which the plaintiff claims is based on some breach of duty by the employer, either by negatively falling short of his obligations, or positively injuriously affecting the conditions of the work; and those cases where the plaintiff's claim is in respect of matters equally apparent to workman and employer existing simultaneously with the constitution of the contract of employment. It may be remarked that, if any risk is not equally apparent to the workman as it is to his employer, there is *ipso facto* a breach of duty in the employer unless he calls his workman's attention to the existence of such risk and its bearings; and such a case would therefore fall under the former class of cases.

Lord Bramwell does not appear to draw any distinction between these classes; and applies an equally stringent rule of liability to both. On the other hand Lord Herschell appears to agree with Lord Bramwell in regarding one rule of liability as applicable to the two classes, but differs widely in his view of what the rule applicable is[1]. Yet, if the two classes of cases are not identical in principle, it is manifest that a method of treatment that does not discriminate them, even if practically satisfactory, which most probably it is not, must, scientifically considered, leave much to be desired and be wanting in a completely accurate adjustment to dissimilar facts.

That the two classes are not identical is plain from this, that the onus of proof in each case is different. For example in the first class, of which *Smith* v. *Baker* as decided in the House of Lords is an instance, the plaintiff having given evidence of a breach of duty on the part of the employer—the neglect of the defendants to perform their common law duty of remedying 'a faulty system of working the crane'—and damage flowing therefrom, had fulfilled all the law required of him in founding a cause of action; and mere subsequent proof, going no further than to show that the plaintiff was not ignorant of the fact of the breach of duty previously to the damage resulting, was not sufficient to shift the onus from the defendants back again to the plaintiff. On the other hand, to take an early case and the best known of all as an illustration of the second class; in *Priestley* v. *Fowler*[2], the plaintiff's claim was in

[1] See pp. 361, 362.

[2] 3 M. & W. 1.

respect of injuries sustained through his master not using 'due and proper care' that a butcher's cart used in the ordinary course of the butcher's business should be 'in a proper state of repair, that it should not be overloaded and that the plaintiff should be safely and securely carried thereby.' In the subsequent case of *Metcalfe* v. *Hetherington*, Parke B.[1] explains the decision to have been that 'the court considered the allegation of duty as altogether insufficient, the declaration not stating facts from which duty could be inferred.' That being so, on proof of the facts alleged in the declaration no cause of action would be constituted, and consequently there would be nothing to submit to the jury. The duty of the judge would accordingly be to nonsuit. The distinction then between the two classes of cases is that in the one a right of action has vested which must, if at all, be displaced by evidence on the part of the defendant. In the other case there are no facts shewn that warrant calling on the defendant to answer.

But in both cases the plaintiff has been injured through imperfections in the implements supplied by the employer. In the opinion of Lord Bramwell in both cases the plaintiff would be disentitled to recover. In the opinion of Lord Herschell apparently[2] in both cases he would be entitled to recover. But in the opinion of the overpowering weight of legal authority in one case the plaintiff would be entitled, in the other disentitled to recover, for reasons which we shall now consider.

We have already seen that, where a workman enters on the performance of work the conditions of which are unnecessarily unfavourable to him, and expressly agrees to undertake the work as it is without amendment of its accessories, the law does not interfere with his free action. If he is injured his is the loss, his employer goes free. If this is the law when the intention of the parties is expressed, the law is not different where a similar intention is unambiguously to be implied. In such a case however, if an alteration increasing the risk is made in the circumstances of the work by the employer, *subsequently* to the occurrences from which unambiguous intention to undertake the existing risks would be inferred, the proof of such alteration in the circumstances raises the presumption of breach of duty against the employer, just in the same way as proof of a contract and proof of non-compliance with its conditions *primâ facie* raises a cause of action in respect of the non-compliance.

The alteration being made subsequently to the employment, the

[1] 11 Ex. p. 270.

[2] At p. 362: 'It was a mere question of risk which might never eventuate in disaster.'

onus would be on the defendant to clear himself from responsibility for its consequences. Suppose him then to proceed to do this by cross-examination of the plaintiff, and to elicit that the plaintiff knew of his breach of the conditions of the employment before he suffered from them. The onus of proof is not changed by this; for the plaintiff's acknowledgment of knowledge is no more than ambiguous. It may be knowledge on which from many circumstances he might not be able to act, e.g. throwing up his work and complaining to his master at once might jeopardize the safety of many lives; or it might be knowledge which weighed the circumstances of risk and resolved to accept them. If the former, the onus is still undischarged; for it cannot be admitted that a master can apply invincible constraint to his servant, and at the same time claim that he works at his free election. If the latter, then proving it the defendant makes out his point. But whichever it is, at the stage we are now the inference is ambiguous, and it is the defendant's duty to shew one that is unambiguous.

Now where a new risk is imposed in the course of an employment, a workman is entitled to as great a freedom of choice before he is committed to its acceptance, as if he had had the work offered to him originally with the newly attaching risk as one of its incidents. To offer a man work manifestly dangerous is however a far different thing from adding a dangerous element to work on which he is already working. In the former case the employment is on the basis of the acceptance of the risk. In the latter there is a more onerous employment without any corresponding consideration. Viewed purely as a contract the superadded risk is outside the consideration. Besides this, by engrafting a new risk on an employment undertaken free from it, the workman's position is, in two respects, worse than if the same work were offered him as a new engagement. First; work he had undertaken on one set of conditions has to be continued by him under another. The workman may very probably have altered his position for the purpose of undertaking the work, e.g. he may have moved from another district, and taken a cottage at an increased rent to be near his work. The inducement then for him not to throw up his work at once would be disproportionately great to what it was originally to take to it. Second; he is now put to avoid a risk he might never have chosen to encounter—a very different thing.

Once more it seems manifestly unfair and unreasonable to require a workman, so soon as he has knowledge of a danger introduced in his work, straightway to throw it up or to be fixed to its acceptance. But beyond this, even where there is knowledge and appreciation, it is hard to say that the workman should be inflexibly held

to have taken the risk. It may well be that he is under influences which preclude his instant abandonment of his work. His state of mind may not be 'I'll take my chance,' so much as 'I can't get out of this job at once. I must go on for a bit.' For example, a man whose work is at the root of an extensive scheme of working, and whose abdication would paralyse the whole, might not unjustly be considered to continue his working from an influence very closely akin to Lord Bramwell's 'physical constraint,' and not from free election. Lord Watson anticipates and provides against a case of this kind by his statement of the principle. He says [1], 'When, as is commonly the case, his (the workman's) acceptance or non-acceptance of the risk is left to implication, the workman cannot reasonably be held to have undertaken it, unless he knew of its existence and appreciated or had the means of appreciating its danger. Put assuming that he did so, I am unable to accede to the suggestion that the mere fact of his continuing at his work with such knowledge and appreciation, will in every case necessarily imply his acceptance. Whether it will have that effect or not depends in my opinion to a considerable extent upon the nature of the risk, and the workman's connection with it as well as upon other considerations which must vary according to the circumstances of each case.'

Such then seem to be the general considerations involved in the application of the maxim *Volenti non fit injuria*. Their more detailed working out may be better considered in the light of some remarks—wholly obiter—of Lord Herschell in his speech in *Smith* v. *Baker* [2] on *Thomas* v. *Quartermaine* [3]. Lord Herschell appears very unfavourably to regard that case, and goes considerably out of his way to express a view detrimental to its authority. 'The accident,' he says, speaking of the accident in *Thomas* v. *Quartermaine*, 'arose from an operation being performed by him' (the injured person) 'in the neighbourhood of the vats, namely, getting a board which served as a lid from under one of them. As far as appears this was amongst the ordinary duties of his employment, and if it be assumed that there was a breach of duty on the part of the employer in not having vats fenced, as it obviously was, since if there had been no breach of duty it would not have been necessary to enquire whether the maxim *Volenti non fit injuria* afforded a defence, it seems to me it must have been a question of fact and not of law, whether the plaintiff undertook the employment with an appreciation of the risk which arose on the occasion in question from the particular nature of the work which he had to perform.'

[1] At p. 335. [2] (1891) A. C. 365 *et seqq.* [3] 18 Q. B. D. 685.

Lord Herschell, in this passage, seems to have fixed his mind on one aspect only of the maxim—that in which it is used as a means of defence—and to have looked upon that as its exclusive function. To do so is however greatly to distort its meaning. The maxim is not a mere enunciation of a line of defence. It may be and often is that, as where it is invoked as the legal conclusion from circumstances which rebut a right of action already vested. But it is more. It is an universal presumption operative, not merely as a defence, but quite as often, to prevent a defence being necessary. In this view it is a presumption of law that must be rebutted before a plaintiff can establish even *primâ facie* any cause of action. This view is clearly put by Brett M.R.[1] In 'an action by a servant against his master for the wrongful condition of machinery on the premises on which the servant is to act, or of the condition of the means by which the services of the servant are to be fulfilled, if the servant confines the allegations in his statement of claim to alleging the existence of danger in any of these things, owing to the negligence of the master he shews no cause of action[2].' 'If the danger is one which was known to the master and not to the servant, the knowledge of the master and the want of knowledge of the servant make together a cause of action, and as it is necessary that these two things should exist in order to form a *primâ facie* cause of action, it is necessary they should be shewn to exist in the statement of claim[3].' And Bowen L.J., dealing by anticipation with the very assumption made by Lord Herschell, says in the same case, 'For the plaintiff it was contended that his knowledge was a mere matter of defence, and that it should so appear as a matter of pleading, but that is not true, for the old form of declaration, as I have already pointed out, must have shewn ignorance on the part of the servant.' Fry L.J. adds very briefly, 'It appears to me to be plain that the knowledge of the master and the ignorance of the servant are necessary to form the cause of action.' This, moreover, is no new law, but, as a reference to the case quoted from and the cases referred to therein will shew, law so completely settled and established as to be indisputable. In the circumstances indicated then two allegations are necessary to form a right of action—knowledge of the master and want of knowledge of the servant. But knowledge by the servant without anything further, the mere fact of knowledge unaided by any legal doctrines or presumptions, would not disentitle him from recovering. Knowledge is in this case significant as it draws with it the application of the maxim *Volenti non fit injuria*. From knowledge—mere knowledge—the fact

[1] *Griffiths* v. *London and St. Katharine Docks Co.*, 13 Q. B. D. at 260.
[2] *Priestley* v. *Fowler*, 3 M. & W. 1. [3] At p. 261.

of being *volens* is presumed; from being *volens* the application of the maxim is further implied.

If this is a correct analysis of what is required to be stated in a pleading to found a right of action, much more must evidence of want of knowledge be given by the workman at the trial, else he fails to substantiate a material element in his cause of action. But since we see that ignorance of an apparent danger existing at the time of entering on an employment will not be inferred, it follows that a workman is presumed in law to have knowledge of it; and this presumption draws after it, without any subtle considerations whether the man appreciated the risk in addition to having knowledge of it, the presumption that the maxim applies. If his case then is that he knows the danger but does not appreciate the risk, he must be nonsuited, unless he specifically raises the point and gives evidence of it in a way the law allows; for the presumption of law is against him and must be rebutted before any right of action can arise.

This absence of any case to go to the jury was the plain ground of the decision of the Divisional Court in *Thomas* v. *Quartermaine*. To use the language of Lord Herschell, with the substitution of a distinct negative for his affirmative, 'It obviously was' *not* 'assumed in *Thomas* v. *Quartermaine* that there was a breach of duty on the part of the employer in not having the vats fenced.' Wills J. indeed expressly says, 'Even supposing there was any risk arising from the passage being narrow, that risk was one which the plaintiff could understand as well as anyone else could, nor could the employer know nor ought he to know anything more about either the nature or extent of the risk than the plaintiff himself.' That is, in the opinion of Wills J. there was no breach of duty at all on the part of the employer. Breach of duty was not merely not assumed, it was distinctly negatived. From this it followed that the plaintiff, of the two ingredients to a cause of action, knowledge of the master, and ignorance of the servant, shewed the presence of only one of them. In such circumstances no cause of action is shewn, and therefore there was nothing to leave to the jury.

Had Lord Herschell's alleged breach of duty existed, a right of action in respect of it would have already accrued to the plaintiff. If then the defendant wished to displace it by invoking the maxim *Volenti non fit injuria*, it could be only as matter in defence which could not be withdrawn from the jury.

The implication from what Lord Herschell says[1], though he nowhere expressly and distinctly formulates the proposition, is that

[1] (1891) App. Cas. at pp. 365, 366.

the question of knowledge or no knowledge is in every case for the jury. As a broad proposition this is just as false as the co-ordinate expression that the question of knowledge or no knowledge is for the judge would be if stated without regard to its limitations. Both propositions are equally true, however, when properly limited. As we have seen, the law presumes knowledge in the plaintiff of dangers in the work on which he accepts employment, till he has given evidence to negative the presumption. If this is not given it is for the judge to say that the facts as they appear infer knowledge on the part of the plaintiff; it then becomes the judge's duty to direct a nonsuit; and if he fails in this the Court of Appeal will redress his omission. When, on the other hand, the plaintiff has dispelled the presumption of knowledge he, so far as this point goes, has raised a presumption of breach of duty on the defendant's part. One of the lines of defence then the defendant may adopt is to attempt to shew, as in *Smith* v. *Baker*, that though the circumstances as detailed in evidence in chief led to the conclusion that there was a breach of duty, still admitting that, for the purposes of this special point, the plaintiff had waived his rights thus arising and was within the presumption expressed by the maxim. On the one side then there would be evidence of the breach of duty, which if uncontradicted would entitle the plaintiff to recover: on the other side there would be some evidence of acceptance of the conditions of working—and thus a conflict of evidence on a question of fact would be produced—which, whatever may be the opinion of the judge who tries the cause, as to its preponderating weight on one side and absolute insignificance on the other, must in accordance with the opinion of the majority of the House of Lords in *Dublin, Wicklow and Wexford Railway Company* v. *Slattery*[1] be decided by a jury.

So much then on Lord Herschell's view as to the application of the maxim *Volenti non fit injuria*. It may, however, be worth while to follow out his further criticisms on *Thomas* v. *Quartermaine*. 'If,' Lord Herschell continues, 'the effect of the judgment be that the mere fact that the plaintiff after he knew the condition of the premises continued to work and did not quit his employment, afforded his employer an answer to the action, even though a breach of duty on his part was made out, I am unable for the reasons I have given to concur in the decision.'

Lord Herschell *assumes* that the condition of the premises was altered after the commencement of the plaintiff's employment.

[1] 3 App. Cas. 1155. [Subject to the question of the verdict being against the weight of evidence, which in that case, as in *Smith* v. *Baker*, could not, as it happened, be raised on the appeal.—Ed.]

But as the cases already noted[1], and the whole body of decisions on the point intermediate between the dates of the two decisions, shew, where there is no evidence given to shew whether a risk was existing before or added subsequently to a plaintiff's entering on an employment, the presumption of the law is that the employment was accepted subject to the risk. Now nowhere throughout the reports of *Thomas* v. *Quartermaine* is there any suggestion of evidence that the risk was a superadded one. The facts not only do not point that way, but the very other. 'Evidence was given by the defendant to shew that it was not usual to fence cooling vats.' Lord Herschell, to point his strictures, assumes further 'a breach of duty.' Now this 'breach of duty' must either have been having the cooler unfenced, or having the board put in too tight. There was nothing to shew that if the latter was the breach of duty it was not the plaintiff's own act or at least the act of a fellow workman. In neither case, either at Common Law or yet under the Employers' Liability Act, 1880, would the plaintiff be entitled to recover. Again, in the words of Lord Halsbury C. in *Membery* v. *Great Western Ry. Co.*[2], 'The thing done is done by himself; he does not contribute to it, but he does it; he puts the thing in motion.' And the same criticism on the plaintiff's action in *Thomas* v. *Quartermaine* is made in *Smith* v. *Baker* by Lord Morris[3]: 'He was not directed to get the board; he did it of himself.'

If, however, the defect was not having the cooler or vat fenced, what duty was violated? As Lord Campbell said in *Seymour* v. *Maddox*[4], the facts of which seem not a little in point: 'In this case there is an allegation that it was the defendant's duty to light the floor and fence the hole, but no facts are alleged from which the duty arises. The express allegation therefore will not help the defect.' Lord Campbell's successor, Cockburn C.J., was commonly regarded as a judge not slothful where humanity was concerned; and in *Clarke* v. *Holmes*[5] in the Exchequer Chamber his expressions went beyond what great judges like Mr. Justice Wightman and Mr. Justice Willes could adopt; yet speaking with reference to 'an employment from its nature necessarily hazardous,' which is scarcely an apt description of the employment in *Thomas* v. *Quartermaine*, he says, 'If he (the workman) thinks proper to accept an employment on machinery defective from its construction, or from want of proper repair, and with knowledge of the facts enters on the service, the master cannot be held liable for injury to the

[1] *Priestley* v. *Fowler*, (1837) 3 M. & W. 1; *Griffiths* v. *London & St. Katharine Docks Co.*, (1884) 13 Q. B. D. 259.
[2] 14 App. Cas. 179.
[3] (1891) A. C. at 369.
[4] 16 Q. B. 326.
[5] 7 H. & N. 937.

servant within the scope of the danger which both the contracting parties contemplated as incidental to the employment[1].' Lord Herschell's view of the law may very possibly be correct if the plaintiff's position was that of one continuing at work after an alteration made in the circumstances of the work; but it has been pointed out already that this is a mere unsupported suggestion invalidatory of the decision; while the presumption of law is in favour of the contradictory hypothesis.

But does the Employers' Liability Act, 1880, alter the position in favour of the workman? By virtue of sec. 2, subsec. 2 of that Act a workman has no right to compensation for injuries caused by reason of any defect or negligence which is specified in sec. 1 in any case where 'he knew of the defect or negligence which caused his injury and failed within a reasonable time to give or cause to be given information thereof to the employer or some person superior to himself in the service of the employer, unless he was aware that the employer or such superior already knew of the said defect or negligence.' In other words, under the Employers' Liability Act, 1880, mere knowledge will in the circumstances indicated by the section raise a presumption of the application of the maxim where at Common Law, as is pointed out by Lord Watson[2], the workman's rights are greater than they are under the Act. 'At Common Law,' says his lordship, 'his (the employer's) ignorance would not have barred the workman's claim, as he was bound to see that his machinery and works were free from defect, and so far the provision operates in favour of the employer; but as was forcibly pointed out by Lord Esher M.R. in *Thomas* v. *Quartermaine*, in cases where the employer and his deputies were personally ignorant of the defect, it is made a condition precedent of the workman's right to recover that he shall have given them information of it before he was injured.' Thus so far from the Employers' Liability Act, 1880, adversely affecting the master's position in the matter now under consideration, in one very important respect the master's position is made stronger under it than it is even at Common Law.

It has been claimed, probably on the strength of Lord Herschell's remarks, that the House of Lords in *Smith* v. *Baker* 'overruled'

[1] With reference to the present point it may be noted that in *Thomas* v. *Quartermaine* Lord Esher M.R., the dissenting judge, there speaking of *Holmes* v. *Clarke* says, 'It is binding on us, and moreover it is in my opinion rightly decided,' 18 Q. B. D. at 690. For other statements of the law to the same effect see per Kelly C.B. delivering the judgment of the Exchequer Chamber in *Indermaur* v. *Dames*, L. R. 2 C. P. 311 at 313. See also Montague Smith's remark in the same case, L. R. 1 C. P. at p. 282, and two Irish cases, *Smyly* v. *The Glasgow & Londonderry Steam Packet Co.*, 2 Ir. C. L. R. 24, *Sullivan* v. *Waters*, 14 Ir. C. L. R. 460.

[2] P. 356.

*Thomas* v. *Quartermaine*. It is worthy of remark that Lord Herschell's is the only opinion in which any doubt is expressed as to the stability of that decision. On the other hand Lord Morris expresses his entire agreement with the decision [1], and on grounds which have already been touched on in this paper.

The Lord Chancellor in his judgment has—perhaps unfortunately—introduced a new ambiguous expression and on a point not yet touched on amongst the disputable propositions collected under the shadow of the maxim *Volenti non fit injuria*. 'For my own part,' he says [2], 'I think that a person who relies on the maxim must shew a consent to the particular thing done;' and again [3], 'I am of opinion myself, that in order to defeat a plaintiff's right by the application of the maxim relied on, who would otherwise be entitled to recover, the jury ought to be able to affirm that he consented to the particular thing being done which would involve the risk, and consented to take the risk upon himself.' The Lord Chancellor's expression is not felicitous, whatever his meaning. Moreover his meaning is doubtful. He may mean that where an employment is rendered dangerous knowledge generally of the increase of the danger will not disentitle a workman subsequently injured from recovering, but his attention must be specially called to the circumstances of the increased risk. For example, in *Smith* v. *Baker*, when the plaintiff first entered the employment his engagement was 'to fill skips or crates with stones which were to be lifted by a steam crane in order to be put into waggons.' While at this work he had an opportunity of observing that the crane when raising stones was sometimes swung over men while working and without notice to them and of concluding that this was dangerous. If Lord Halsbury's words mean no more than that notice of danger obtained in such circumstances was not to be construed into a consent to encounter the danger when the workman's work was altered and he was set beneath the crane, they express little more than a truism and merely add a possible additional ambiguity to the already too numerous ambiguous dicta. But 'to shew a consent to the particular thing done' may mean greatly more than this.

The illustrations of Lord Abinger in his well-known judgment in *Priestley* v. *Fowler* may well, with some limitations, be pointed to the Lord Chancellor's new-found principle. 'The footman, therefore, who rides behind the carriage may have an action against his

[1] See at p. 369.

[2] At p. 336.

[3] At p. 338 Lindley L.J. uses the phrase 'to incur a particular danger;' it does not appear plausible to assume the Lord Chancellor meant the same thing when he speaks of shewing 'a consent to the particular thing done.' A particular danger may arise from a whole class of acts; 'a particular thing done' seems altogether singular.

master for a defect in the carriage owing to the negligence of the coach-maker, or for a defect in the harness arising from the negligence of the harness-maker. . . . The master, for example, would be liable to the servant for the negligence of the chamber-maid, for putting him into a damp bed; for that of the upholsterer, for sending in a crazy bedstead, whereby he was made to fall down while asleep and injure himself; for the negligence of the cook, in not properly cleaning the copper vessel used in the kitchen; of the butcher, in supplying the family with meat of a quality injurious to the health; of the builder, for a defect in the foundation of the house, whereby it fell and injured both the master and the servant by the ruins.' For these and all other like calamities it seems the opinion of the Lord Chancellor that the master is liable till he can 'shew a consent to the particular thing done.' If this be indeed his meaning it is obvious that such an interpretation wholly transforms what has hitherto been looked on as the law. A man may and often does consent to work in a general danger—to take the risk of an employment. It would be marvellous to find one who consents to 'the particular thing' that injures him. His consent to the risk is on the chance of 'the particular thing' never coming off.

When a man enters on the performance of dangerous work the underlying condition is that the operations attending the work are performed in the ordinary and usual way. If they are, and the workman is injured and complains that 'the particular thing' had not been pointed out to him, the answer seems plain and conclusive. 'The work has been carried out in the ordinary and usual way; and this you consented to as I have already proved; or if it has not, it is for you to point out that it has not. You entered on the work on those conditions, and so it must be presumed against you that they have been performed. You cannot, now that you are injured, call upon your master to prove you consented to "the particular thing" which injured you—he having already proved you undertook the general risk.'

The stress of proving 'consent to the particular thing done,' it is obvious, cannot arise till after consent to encounter the ordinary dangers of the employment has been proved, and so far as it is one of these ordinary dangers would, therefore, seem to need no further proof; it *is* proved—not as 'a particular thing done' but as one of the ordinary risks of the employment; so far as it is not one of these it would come under quite different principles from what we have been here considering; and thus in either view the Lord Chancellor's principle is unnecessary; or to phrase the matter somewhat differently—in one view what has always been said before is said again in an embarrassing way; while in the other

to give scope for its application all the inconvenient cases from *Priestley* v. *Fowler* downwards must first be overruled.

Lord Bramwell's principle of 'physical constraint' must not be passed unnoticed. The most uncompromising statement of it is found in his speech in *Membery* v. *Great Western Ry. Co.*[1]: 'I hold that where a man is not physically constrained where he can at his option do a thing or not, and he does it, the maxim applies;' but the same notion runs through what he says in *Smith* v. *Baker*. As a philosophical thesis this may be correct. The just man in the abstract doubtless realizes Lord Bramwell's opinion of him.

> 'tenacem propositi virum
> non civium ardor prava jubentium
> non vultus instantis tyranni
> mente quatit solida.'

Neither his employer nor his trade union makes him dismayed. But the ordinary unskilled labourer of daily life is not so graciously fortified. He is not infrequently dense—exceedingly, and improvident as a child. His most probable attitude in the circumstances Lord Bramwell involves him in is neither consent nor dissent, but hopeless, helpless vacillation, till his trade union decides for him. On analogous grounds to those on which the law favourably views the case of young persons—whose privileges, at least, Lord Esher is not disposed narrowly to circumscribe—the law should pay regard to the average mental state of day-labourers. To mete out law regulated by inflexible logic to that class of the community whose habits are most formed by convention and least by logic, would be to apply a standard to which in fact it never conforms. But even as a logical test Lord Bramwell's principle does not fulfil its requirements. If he means that a man working at dangerous work is *volens* unless he is actually working in bonds—his phrase is 'physically constrained'—he is suggesting a test practically impossible in modern civilized life. To propose such a test as actual physical constraint is to suggest that all cases of working in presence of a danger involve consenting to the risk of the danger; and since 'physical constraint' is the only exculpatory circumstance the principle is tantamount to the imposition of an irrebuttable presumption of voluntary working. But never yet has such a principle been even alluded to in an English case. Whether a man is *volens* or not has always been a matter to be determined by evidence, and that too not confined to any narrow issue.

On the supposition that Lord Bramwell's principle of 'physical constraint' means less than actual physical constraint, its limits are not necessarily different from those of the principles considered

[1] 14 App. Cas. 179 at 187.

in this paper. All society, philosophers tell us, rests ultimately on physical force. Men generally would not work but with the threat of hunger as a final sanction to constrain their idleness. If actual physical constraint is not meant, the alternative is a present power of constraining. But the existence of this is most often not a question of fact but of opinion. The moral and physical condition of the individual is more largely operative in determining what is a present power of constraining than any objective influences whatever. The individual, his self-confidence, his apprehensions are the prime factors to be reckoned with. Different minds will judge very differently of the same external circumstances. Some will be driven to madness by apprehensions, which others will go through wholly unperturbed. But once admit the relevancy of influences on the mind and there is an end, so far as it has any special application, of Lord Bramwell's theory of physical constraint.

The probability, however, is that Lord Bramwell did not regard it as a principle applicable in this class of cases universally; and the paradoxical expression in which he indulged was no more than the result of the revulsion in his mind from what he may have regarded as too great prominence accorded to that view of the maxim *Volenti non fit injuria* which looks at it as a formula of a defence and not as a legal presumption. In his view of the facts in *Smith* v. *Baker* 'the work was unchanged in character and was the same when he (the plaintiff) entered the service as when he was hurt[1];' and thus viewed the plaintiff was suing in respect of an injury, the risk of which he was paid to incur. He was in Lord Bramwell's view of the facts in the same position as the plaintiff in *Griffiths* v. *London and St. Katharine Docks Co.*[2] In such circumstances we have seen how strong the presumption of law against the plaintiff is; and if Lord Bramwell's proposition is that actual physical constraint can alone justify a man in undertaking an employment subject to a manifest risk, and then suing his employer for injury resulting from what he had full in view when he undertook the work, the main ground of objection to the proposition appears to be that it tends unduly to narrow the means of proof rather than that it asserts a proposition unsound in its practical working. The majority of the House of Lords viewed the use of the maxim in *Smith* v. *Baker* as an attempt to oust an already vested right of action, and so regarded, the considerations Lord Bramwell was led by became inapplicable.

The sole point actually decided in *Smith* v. *Baker* is that, where a workman is engaged in work not in its own nature dangerous,

[1] At p. 346. [2] 13 Q. B. D. 259.

he is not concluded from recovering for an injury received from dangerous surroundings, which it is not necessary he should appreciate for the purposes of his work, merely by having gone on with the work he was engaged to do with the risk from which he receives the injury full in front of him.

THOMAS BEVEN.

[In *Smith* v. *Baker*, as I read it, the danger was not the necessary danger involved in stones being swung over the workmen's heads, but (according to the finding of fact not open to review) the unnecessary danger of their being less firmly secured in some way than they might and ought to have been.

*Thomas* v. *Quartermaine* is not overruled, but it was really, as Lord Morris pointed out, a case of no negligence at all.

Lord Bramwell's theory that there is no difference between knowledge, assent, and consent, has the merit of robust simplicity, but has never been the law of any civilized country.—ED.]

## TRUSTEESHIP AND AGENCY.

WE are so accustomed at the present day to the system of trusts as a convenient way of separating the legal from the beneficial ownership of property, that we are apt to forget that at one time trusts were largely employed to evade liabilities and other troublesome incidents attaching to the legal ownership of land. A long series of Acts of Parliament, from the Statute of Uses to the Intestates' Estates Act, 1884, have removed the most important anomalies arising from the invention of uses and trusts. For the purposes of execution, bankruptcy, dower, and taxation, there is now no difference in theory between legal and equitable beneficial ownership, although the preambles of the earlier statutes show that then, as now, the rights of creditors were often in practice defeated by secret trusts.

These statutory alterations in the law relating to equitable ownership leave untouched the general principle that a trustee, as regards all the world except his cestui que trust, is absolute owner of the trust property, while the cestui que trust has no rights and is subject to no liabilities, except as between him and his trustee. It is obvious that such a theory, if carried to its full extent, would open the door to grave abuses, and accordingly certain exceptions have been established, all of which may be referred to the rule laid down by Mr. Lewin, that 'the court will not permit the system of trusts to be directed to any object that contravenes the policy of the law[1].' The rule so stated is somewhat vague, and it may be useful to examine its limits.

It is clear that if a person attempts to create a trust for an immoral or illegal purpose, the court will neither enforce the trust nor restore the property to the person who attempted to create it. There appears to be an exception to this rule in cases where the illegal purpose has not been carried out[2]. How far an attempt to evade the provisions of an Act of Parliament constitutes an illegal purpose is a question on which the authorities are conflicting[3].

[1] Lewin on Trusts, 96.

[2] *Birch* v. *Blagrave*, Amb. 264; *Platamone* v. *Staple*, G. Coop. 250; *Cecil* v. *Butcher*, 2 J. & W. 565; *Symes* v. *Hughes*, L. R. 9 Eq. 475; *Great Berlin Steamboat Co.*, 26 Ch. D. 616. According to some authorities this exception also applies to illegal contracts which have not been wholly or partially performed (see *Taylor* v. *Bowers*, 1 Q. B. D. 291), but the recent case of *Kearley* v. *Thomson* (24 Q. B. D. 742) throws some doubt on the point.

[3] See *Callaghan* v. *Callaghan*, 8 Cl. & F. 374 *Brackenbury* v. *Brackenbury*, 2 J. & W.

Again, where a person has acquired property subject to onerous personal liabilities, he cannot retain the benefit and escape the liabilities by transferring the property to another person as his trustee or nominee, if the transfer is made for that purpose. This rule is most frequently applied in the case of colourable transfers of shares in companies, but it has also been applied in the case of leases. Thus in *Philpot* v. *Hoare*[1], Lord Hardwicke held an assignment of a lease to be fraudulent because it was made to a man of straw as agent or trustee for the assignor with the object of evading liability for the rent. In *Fagg* v. *Dobie*[2] an assignment with a similar object was held to be valid because it was made absolutely, without the reservation of any benefit for the assignor, and this case was approved in *Ex parte Hepburn*[3], where the court declined to recognise an assignment of an under-lease made to an impecunious person to enable him to take a vesting order under s. 55 of the Bankruptcy Act, 1883 as trustee for the under-lessee and thus give the under-lessee the benefit of the lease without its burdens. The principle of these cases, however, does not apply to a person who has never entered into a personal engagement with reference to property, and the question whether he can enjoy the benefit of it without being subject to its burdens involves other considerations. Here again the question is of importance chiefly in connection with shares in companies and leases, but it has also arisen in the case of a business carried on by executors or trustees.

As regards shares in companies, there is no doubt that if a person who is really trustee for another is registered as shareholder of a company, the trustee is the only person to whom the company can look for payment of calls[4]. Similarly in the case of a lease held on a trust, the general rule is that the trustee is personally liable in respect of the rent and covenants, and that the cestui que trust is not. And in the case of trustees carrying on a business for the benefit of their cestuis que trust, the creditors must as a general rule look only to the trustees for satisfaction of their claims. The principle in all these cases appears to be that the liability of the trustee arises out of an express contract, and that the creditor can only look to the person with whom he has contracted and to whom he has presumably given credit. Here are, however, some exceptions to the rule.

A. If a shareholder in a company transfers his shares to an

391; *Childers* v. *Childers*, 3 K. & J. 310; 1 De G. & J. 482; *Groves* v. *Groves*, 3 Y. & J. 163; *May* v. *May*, 33 Beav. 81; *Barton* v. *Muir*, L. R. 6 P. C. 134; *Tooth* v. *Power*, (1891) A. C. 284; *Harding* v. *Comm. of Land Tax*, ibid. 446.

[1] 2 Atk. 219. [2] 3 Y. & C. 96. [3] 25 Q. B. D. 536.

[4] *Bugg's* case, 2 Dr. & Sm. 452; *In re European Society*, 8 Ch. D. at p. 708. See also *New London &c. Bank* v. *Brocklebank*, 21 Ch. D. 302.

infant (the company not being aware of the infancy), the transferor remains liable on his shares; and if a person purchases shares on the market and has them registered in the name of an infant, he is liable to be put on the list of contributories [1]. It is assumed by text-writers [2] that if a person subscribes for shares in the name of an infant he is liable to be put on the list of contributories in respect of them. The precise point does not appear to have been decided [3]. By an extension of the same principle, if a person purchases shares on the market in the name of an infant (the vendor not being aware of the infancy) the vendor is entitled to be indemnified by the real purchaser against the liability to which he remains exposed by reason of the shares being registered in the name of the infant [4]. And although a bona-fide and out-and-out transfer of shares relieves the transferor of liability, yet to be good 'it must be an out-and-out transfer and it must be bona fide [5]:' if it is made solely for the purpose of evading liability the better opinion is that the transferor remains liable [6]. In all these cases either there was privity of contract between the contributory and the company, or the contributory had made use of what was practically an alias or dummy name, being that of an irresponsible person. The principle, however, has not been extended to the case of a purchase of shares on the market in the name of a man of straw, even if the shares are put in his name for the purpose of escaping liability [7], so long at least as there is not any misdescription or misrepresentation. Thus in *Williams's* case [8] a person who had purchased shares on the market gave as the name of the transferee that of a foreman in his employment: in the transfer the foreman was described as a gentleman, and the address given was that of his master's works. The transfer was approved by the directors. On the company being wound up the liquidator applied to have the master put on the list of contributories, but Jessel M.R. refused the application, on the ground that the master had entered into no contract with the company and had been guilty of no misrepresentation. The Master of

[1] *Richardson's* case, L. R. 19 Eq. 588.

[2] Lindley on Companies, 811.

[3] *Weston's* case (L. R. 5 Ch. 614) was a case of transfer by a shareholder into the name of an infant, and in *Richardson's* case the shares were purchased on the market and registered in the name of an infant.

[4] *Brown* v. *Black*, L. R. 8 Ch. 939. See *Castellan* v. *Hobson* (L. R. 10 Eq. 47), where the same principle was applied to the case of a purchase of shares in the name of a man of straw, the company having gone into liquidation before the transfer was registered.

[5] Per Kay J. in *In re South London Fish Market*, 39 Ch. D. at p. 331.

[6] See the cases collected in Lindley on Companies, 825-6, and per Lindley L.J. in *Ex parte Hepburn*, 25 Q. B. D. at p. 542.

[7] *King's* case, L. R. 6 Ch. 196. In this case the Court thought that the shares were put in the name of a man of straw for an honest purpose.

[8] 1 Ch. D. 576.

the Rolls thought that describing the foreman as a gentleman residing at his master's works did not constitute a misdescription. It is however difficult to see how the transaction could have been carried through without a misrepresentation of another kind, for in the transfer the purchase-money must have been expressed as paid by the foreman, thus representing the transaction as an ordinary purchase by the foreman from the vendor, which it was not. 'When such a representation is made, the directors may well trust to it, and be excused for asking no questions about it[1].' If it had been stated in the transfer that the purchase-money was paid by someone other than the foreman, the directors would have been put on enquiry[2], and their acceptance of the transfer would have bound the company. As it was, the transaction was misrepresented for the purpose of avoiding inquiry, and the real purchaser, who made the misrepresentation, ought, it is submitted, to have been held liable.

B. It was formerly considered that if a person became equitably entitled to the benefit of a lease, he became equitably liable to its obligations[3]; but it may now be considered established that this is not so, although if he takes possession of the land he may be liable at law as an occupier or trespasser[4], and this rule applies even where the lease is taken in the name of trustees on behalf of a corporation or partnership[5]. The case of *Wright* v. *Pitt*[6] decided by Malins V.C. appears at first sight to be inconsistent with these authorities, but there the mining company which was equitably entitled to the lease was in the dilemma of being either compelled to perform the terms of the lease or of being treated as a trespasser, and it appears to have elected to submit to the former alternative, so that the decision cannot be taken as impugning the authority of *Walters* v. *Northern Coal Mining Co.* and *Cox* v. *Bishop*. The possibility of a person being exposed to liability by reason of his equitable interest in a lease formerly caused some alarm among conveyancers, as it was supposed that on a mortgage by sub-demise it would be dangerous to declare a trust of the nominal reversion for the mortgagee, but this doubt has long been dispelled[7]. In *Mander* v. *Falcke*[8] a restrictive covenant in an under-lease was

[1] Per Giffard L.J. in *Ex parte Kintrea*, L. R. 5 Ch. p. 100. See also *Payne's* case, L. R. 9 Eq. 233.

[2] See *Masters'* case, L. R. 7 Ch. 292, where the consideration was stated in the transfer to be merely nominal.

[3] The earlier cases are examined in a pamphlet entitled 'An Essay on Equitable Tenancies under Legal Terms of Years,' published anonymously in 1849.

[4] See *Moore* v. *Greg*, 2 Ph. 717; *Cox* v. *Bishop*, 8 De G. M. & G. 815.

[5] *Walters* v. *Northern Coal Mining Co.*, 5 De G. M. & G. 629; *Kay* v. *Johnson*, 2 H. & M. 118.

[6] L. R. 12 Eq. 408.

[7] *Moores* v. *Choat*, 8 Sim. 508, and the cases cited in the last three notes. Davidson, Conv. II. ii. 120.

[8] (1891) 2 Ch. 554.

enforced against both the under-lessee and the occupier, Kekewich J. holding that the under-lessee was a trustee of the under-lease for the occupier. On an appeal by the latter, the Court of Appeal maintained the injunction against him. 'I do not proceed on the hypothesis that he is cestui que trust of the under-lease, for that is uncertain. I treat him simply as an occupier managing the business[1].'

C. Trustees or executors who carry on a business for the benefit of their cestuis que trust are of course personally liable for all debts contracted by them, and in ordinary cases the creditors have no other remedy. Where however the testator has specially appropriated part of the trust estate for the purpose of carrying on the business the creditors have a lien on that particular part for payment of their claims. The true basis of the rule seems to be that as the trust estate gets the profits of the business it ought to bear the liabilities[2], but as it would be practically impossible to administer the estate if the whole of it were subject to the lien, the creditors' right is limited to the fund appropriated to the business[3].

D. There is an anomalous class of cases in which the performance of a contract has been enforced both against and in favour of a person who, although not a party to the contract, is beneficially interested in it. Some of these cases fall within the special rules relating to marriage settlements[4]. The others appear to be divisible into two sub-classes:—

(*a*) If a contract is entered into between *A* and *B* in such a way as to show that *B* is merely a trustee for *C*, and *B* refuses to enforce the contract, *C* can sue on it in equity[5]. It would seem that in such a case the question of trusteeship to a large extent depends on whether there was a practical necessity or other good reason for interposing a trustee between *A* and *C*.

(*b*) If *A* does work which is beneficial to *B* without having a contract with *B* or anyone else, and *B* takes the benefit of the work, *A* can in equity recover remuneration for his services against *B* on what is sometimes called an equitable *quantum meruit*[6]. So if *A* contracts with *B* as trustee for an intended company to sell property to the company, and the company is formed and takes possession of the property, *A* can sue the company in equity for

[1] Per Lindley L.J. at p. 557.
[2] See per Jessel M.R. in *In re Johnson*, 15 Ch. D. at p. 552.
[3] *Ex parte Garland*, 10 Ves. 110; *Strickland* v. *Symons*, 26 Ch. D. 245; *In re Gorton*, 40 Ch. D. 536, '91, A. C. 190.
[4] Pollock on Contract, 199.
[5] *Gandy* v. *Gandy*, 30 Ch. D. 57. *Gregory* v. *Williams* (3 Mer. 582) appears to rest on the same principle: see *Re Empress Engineering Co.*, 16 Ch. D. 125.
[6] *Touche* v. *Metropolitan &c. Co.*, L. R. 6 Ch. 671; *Re Hereford &c. Co.*, 2 Ch. D. 621; *Re Rotherham Co.*, 25 Ch. D. 103.

the contract price. It is difficult to say whether the principle is the same in all these cases, for some of them are put on the ground of part-performance or adoption giving rise to a new contract [1], while in others the liability is described as 'an equitable liability depending on equitable grounds [2],' those grounds apparently being that if a company adopts and derives benefit from the services of a person it is in equity bound to pay for them [3].

Setting aside for a moment the question of shares in companies, the authorities above referred to do not cover a case which can hardly fail to occur, though it does not so far appear to have come before the courts, namely that of a person entering into a contract or acquiring onerous property in the name of a nominee for the purpose of evading responsibility. Suppose that *A*, being minded to start a hazardous or speculative business, induces *B*, a man of straw, to enter into a contract for the lease of some property at a heavy rent and subject to stringent covenants; *B* agrees in writing [4] to hold the lease as trustee for *A*, and the lessor knows nothing of *A*'s interest in the matter. If the business fails and the rent falls in arrear, and the covenants are broken, has the lessor any remedy against *A*? So long as the matter rests in agreement, there seems no reason why the ordinary rule of principal and agent should not make *A* liable for the obligations undertaken by *B*. And even if the lease is actually granted by deed to *B*, a court of equity ought, it is submitted, to disregard the technical rule of the common law that where an agent is made party to a deed as principal, the real principal cannot sue or be sued on it [5], and to hold *A* liable on the lease. In *Pickering's Claim* [6] the claimant knew at the time of the execution of the deed that the person who entered into it was a trustee for a company, which was not a party to the deed, and the decision seems to have turned on this point, the claimant being held to have elected to accept the trustee as covenantor in lieu of the cestui que trust. The case supposed is quite distinct from that of a bona fide trust, for where a trustee under an ordinary settlement takes a lease, it could not of course be contended that the lessor can enforce the contract against the beneficiaries. There is no difficulty in drawing the line between the two cases; if there was some good reason for the creation of a trust, the cestui que trust is not liable to be sued on the obligations of his trustee; if on the other hand the so-called trustee is

[1] See *Re Northumberland Avenue Hotel Co.*, 33 Ch. D. 16; *Howard* v. *Patent Ivory Co*, 38 Ch. D. 156; *Lavery* v. *Pursell*, 39 Ch. D. 508.

[2] Per James L.J. in *In re Empress Engineering Co*, 16 Ch. D. at p. 130.

[3] Per Mellish L.J. in *In re Hereford &c. Co.*, 2 Ch. D. at p. 625.

[4] See *James* v. *Smith*, (1891) 1 Ch. 384, since affirmed on appeal.

[5] See *U. K. Mutual Ass.* v. *Nevill*, 19 Q. B. D. 110; *Montgomerie* v. *U. K. Mutual Ass.*, (1891) 1 Q. B. 370.

[6] L. R. 6 Ch. 525.

a mere nominee or dummy, put forward for no other reason but to screen the so-called cestui que trust from responsibility, the relation between them is that of principal and agent, and the principal is liable.

In the case of shares in a company being registered in the name of an agent or nominee, the rule that the register is *prima facie* evidence of membership, and that the company is not bound to notice any trust, makes it more difficult to fix the principal with liability than in the case of ordinary property. The rule exists for the benefit of the company, and if it sometimes produces inconvenience or loss, the natural tendency is to let the company suffer. Hence if a member of a company, in order to multiply votes, subdivides his holding of shares by putting them in the names of nominees, the court will not interfere to prevent it [1], and the same tendency has led to the establishment (or supposed establishment) of the rule that 'where shares are held by *A*, whether as trustee for *B* or simply as his agent, and *B* has done nothing to render himself a shareholder, according to the company's regulations, and has never acted or been treated as a shareholder, he is not a shareholder, although *A* may be insolvent [2].' In the case of a bona fide trust, the rule is undeniable, but it 'will not be adhered to where a departure from it is required in order to defeat fraud [3];' while as regards the case of an agent the authorities really only cover one branch of the rule. Where *A* buys shares in the market in the name of *B*, it is obvious that in the absence of misdescription or other fraud [4], there is nothing to make *A* liable to the company [5]. He does not contract to take the shares from the company, but from someone else, and if the company desires to protect itself against such transactions it must do so by the usual clause as to transfers of shares on which there is a liability. But where *A* induces *B* to apply for shares in his own name as a mere nominee for *A*, with the intention that *B* may evade liability if the company proves unsuccessful, there is, it is submitted, no difficulty in applying the ordinary rule of principal and agent so as to make *A* liable. An application for shares, followed by allotment, is a contract to take them and to pay what is due in respect of them, and whether *A* applies in his own name,

[1] *Pender* v. *Lushington*, 6 Ch. D. 70; *Moffatt* v. *Farquhar*, 7 Ch. D. 591. Where shares are required to be held by the shareholder 'in his own right' (e. g., as a qualification for office, or to entitle a creditor to obtain a charging order), it seems that in some cases, at all events, the question whether he is the real owner or merely a trustee, can be gone into: see *Bainbridge* v. *Smith*, 41 Ch. D. 462; *Gill* v. *Continental Co.* L. R. 7 Ex. 332; *Cooper* v. *Griffin*; '92, 1 Q. B. 740.

[2] Lindley on Companies, 46.

[3] Ibid. 802.

[4] See *Williams's* case, 1 Ch. D. 576, and the cases referred to supra, pp. 222, 223.

[5] *Ex parte Bugg*, 2 Dr. & Sm. 432; *King's* case, L. R. 6 Ch. 196.

or in the name of his agent, he is the person liable on the contract. The fact that the shares are registered in *B*'s name cannot affect the question, for the register is merely *prima facie* evidence and can be rectified on discovery of the true facts.

In *Cox's* case[1] a person obtained shares in a cost-book mining company (apparently direct from the company) and put them in the names of nominees 'for the purpose of deluding the public into an exaggerated estimate of the number of shareholders.' It was held both by the Vice-Warden of the Stannaries, and by the Lords Justices, that this wrongful purpose prevented the relationship between the real owner and the nominees from being that of cestui que trust and trustee, and the real owner was placed on the list of contributories.

In *Coventry's* case[2] a number of bogus applications for shares were made by the directors of a company in order to make it appear that there was a demand for the shares, but it was arranged between the directors that neither they nor their nominees should be under any liability in respect of their applications. They accordingly allotted 200 shares to the son of one of the directors, and the father shortly afterwards filled up and sent to the company a form of application for 200 shares in the name of his son, who was living abroad and knew nothing about it. The father having died, his executors were placed on the list of contributories. Mr. Justice Kay thought that *Cox's* case applied, and refused to remove their names. He stated the rule as follows: 'If a man applies for shares in the name of a nominee, that is a perfectly good transaction, and the nominee, although only a trustee, and not the nominor, is the shareholder. But if a man applies for shares in a false name, or the name of someone who knows nothing about the application, or the name of an infant, who cannot be made responsible—a dummy name instead of his own—the court treats that man as the real shareholder and the name handed in as a dummy name, and the court does not absolve him from liability.' The Court of Appeal thought that *Cox's* case did not apply, because in the case at bar there was no intention on the part of the father or anyone else to take the shares. It may be objected that if the father had applied for and been allotted the shares in his own name, he could not have escaped liability by pleading a collateral agreement with the other directors that the application should be treated as a nullity: such an agreement would have been wholly inoperative. It is difficult to see why an illegal agreement should become lawful and operative by the mere fact that the application

[1] 4 D. J. & S. 53.

[2] (1891) 1 Ch. 202.

and allotment were made in a dummy name[1]. However, this question does not affect the proposition for which the case may be cited as an authority, namely, that a man may apply for shares in the name of a mere nominee for a dishonest purpose and yet escape liability. The point did not really arise, and therefore the passage in Mr. Justice Kay's judgment to the effect that such a transaction is perfectly good is a mere dictum. It is clear that in the case of a trust properly so-called the cestui que trust is not liable on shares registered in the name of his trustee, and even in cases where there is no trust in the ordinary sense of the word, circumstances may occur to justify an application for shares in the name of a nominee. They did in fact occur in *Bugg's* case[2] and other possible justifications are suggested by *Newry Railway Co.* v. *Moss*[3], *King's* case[4], and *Pugh and Sharman's* case[5], while the case of the Parsee merchant[6] shows that the existence of an improper motive will not be assumed from the mere fact that a man has applied for shares in the name of a nominee. But where a person applies for shares in the name of a man of straw and conceals his own interest in the matter, it may be fairly assumed, in the absence of some reasonable and proper motive, that his object was to screen himself from liability, and he should be treated as the principal in the transaction. And the same rule may (it is submitted) be applied to any contract for the acquisition of onerous property, such as a lease. To hold otherwise is to mistake form for substance, and to confuse the real distinction between trusteeship and agency. A trust which is created for a fraudulent or improper purpose is no trust, except in form; the real status of the so-called cestui que trust is that of a concealed principal.

CHARLES SWEET.

[1] The judgment of the Court of Appeal does not seem to have proceeded on the ground that the application was made after the allotment.

[2] 2 Dr. & Sm. 452.

[3] 14 Beav. 64.

[4] L. R. 6 Ch. 196.

[5] L. R. 13 Eq. 566.

[6] *London Bombay &c. Bank*, 18 Ch. D. 581.

# EXPENSES AT A PORT OF REFUGE.

## I.

IN the autumn of 1890, at Liverpool, the Conference of the Association for the Reform and Codification of the Law of Nations, revised the York Antwerp Rules of general average, and adopted unanimously the new partial Code of general average which is known as the York Antwerp Rules, 1890.

In these later Rules the provisions with regard to port of refuge expenses were stated with greater fullness; and were widened, so as to carry further the important departure from English law which appeared in the earlier Rules, formulated in 1877. Views prevalent on the Continent, and in the United States, have been again preferred to the doctrines of our law; and as the Conference was largely attended by Englishmen practically concerned with the subject, shipowners, shippers, underwriters, average adjusters, and lawyers, it may be supposed that the conclusions they adopted are nearer to the business ideas of what is right than the law is. And this supposition is confirmed by the fact that the York Antwerp Rules, and now the York Antwerp Rules 1890, have been very widely adopted in contracts of affreightment and insurance.

These facts seem to justify an enquiry into the position of the law of England on this subject, with a view to considering whether it may not be desirable that the law itself should be amended, and if so, in what manner.

Without attempting to consider all the various cases which occur of putting into a port of refuge, I propose to discuss the law, and the practice of English adjusters, with reference to the frequent case of a ship which has put into port *for repairs*, necessary for the safe prosecution of the voyage, where the repairs cannot be effected without first discharging the cargo. And then to contrast these with the rules which prevail abroad on the subject; and also with the York Antwerp Rules 1890, of which the short effect is that the expenses of discharging the cargo to enable such repairs to be done, and the subsequent expenses of storing that cargo and reshipping it, are to be treated as general average.

When a ship deviates to a port of refuge, because it is unsafe to remain at sea, whether on account of some immediate danger,

such as a storm or an enemy's cruiser, or because the ship is so damaged, or her equipment so impaired, that she cannot safely continue on her voyage, in either case the putting in to port is a general average act. It is an act done voluntarily for the common safety under the pressure of a common risk. Hence the extraordinary expenses incurred in getting into the port of refuge, and the necessary harbour dues, are always general average expenses.

Where repairs are needed, and the need has been caused by a general average sacrifice, as by cutting away masts, or rigging, the law as to consequential expenses is sufficiently clear. The Court of Appeal, in *Atwood* v. *Sellar* [1], decided that the expenses of warehousing cargo which had been necessarily discharged in order to repair damage of that kind, and also the expenses of reshipping that cargo, and the outward expenses, pilotage, &c., incurred in leaving the port, were all chargeable to general average. The cost of discharging the cargo from the ship was there admitted to be general average, so that no decision on that point was called for; but the reasoning of the Court plainly covered the expenses of that work. The necessity for repairing at a port of refuge is an immediate consequence of cutting away the mast, &c., and the expenses of effecting the repairs, which involve the discharge of cargo, is all general average expenditure.

We pass then to the more difficult group of cases in which the ship puts into port in consequence of having sustained *accidental* damage, which must be repaired before she can safely proceed on her voyage, and which cannot be effected without first discharging all or part of the cargo. In such a case, the cost of the repairs falls wholly upon the shipowner; the accident has befallen his property, and if he decides to repair it he must pay the cost. That is well established [2]. The trouble arises with regard to the expenses of discharging, storing, and reloading the cargo incurred in consequence of doing the repairs.

The law on this subject was much discussed in *Svendsen* v. *Wallace* [3], and so far as it can be considered as settled, was settled by that case. The Court of Appeal there decided that, in the circumstances we are considering, the expenses of warehousing the discharged cargo, and reloading it are not general average; also that the expenses of pilotage, &c., in putting out to sea again, are not general average. The House of Lords affirmed this judgment with regard to the expenses of reloading the cargo, but left the other points undetermined as being unnecessary to the decision then called for. Lord Blackburn, who gave the leading opinion in the House of

[1] 5 Q. B. D. 286.
[2] *Hallett* v. *Wigram*, 9 C. B. 580.
[3] 11 Q. B. D. 616; 13 Q. B. D. 69; 10 A. C. 404.

Lords, did not state his reason for deciding that the reloading expenses were not general average [1]. But in the Court of Appeal, the grounds of the judgments of the majority (Lord Esher M.R. and Bowen L.J.) are very clear. It was held that such expenditure is not general average, because it is not incurred to save the ship and cargo from a common peril threatening their physical safety; nor is it expenditure 'caused or rendered necessary' by any sacrifice made for that purpose and under those conditions. 'A general average sacrifice is an extraordinary sacrifice voluntarily made in the hour of peril for the common preservation of ship and cargo [2].' 'The reloading of the cargo and the outward expenses, are expenses of acts done when both ship and cargo are safe from existing danger, and are therefore not within the rule [3].'

The opposing view, contended for in that case, that an expenditure is general average if made for the benefit of ship and cargo, *to enable the common adventure to be completed*, was distinctly rejected by both judges. Bowen L.J. said [4]: 'Exceptional cases apart it is not sufficient, according to English law, that an expenditure should have been made to benefit both cargo-owner and shipowner. The idea of a common commercial adventure as distinguished from the criterion of common safety from the sea, would lead to the inclusion in general average of, at all events, temporary repairs of the ship caused by particular average loss, and would enable the shipowner to complete his part of the contract of affreightment by means of a money contribution levied perforce upon the cargo-owner.'

Let us now compare the practice of adjusters on these points with the law there laid down:—

(1) With regard to the cost of unloading, there has been a remarkable steadiness of practice among adjusters; it has been the uniform rule to charge it to general average, whether the repairs to be done have been necessitated by accident or by sacrifice. And thus it has come about that the question has not been raised in the Courts. Even in *Svendsen* v. *Wallace* it was not disputed.

But it is, I believe, quite impossible to reconcile this practice with the leading principle definitely adopted in *Svendsen* v. *Wallace*. Where the condition of the ship after arrival in the port of refuge is such that both ship and cargo are in danger, say of sinking, until the cargo is discharged, the operation of unloading is no doubt done for the common safety 'in the hour of peril,' or, perhaps more accurately, under pressure of a common danger; and is therefore itself a general average act. But the cases which I put for consideration are those in which ship and cargo are safe within the

[1] 10 A. C. p. 417.
[2] Per Bowen L.J. 13 Q. B. D. p. 84.
[3] Per Lord Esher, 13 Q. B. D. p. 78.
[4] 13 Q. B. D. at p. 86.

port of refuge, but in which the ship cannot be repaired, and the voyage consequently cannot be proceeded with, unless the cargo, or part of it, be discharged. In such a case it is for the shipowner to determine whether he will, or will not repair. Generally he is bound to repair, unless the damage sustained has been caused by perils excepted in the contract of carriage, and is of such a character that it prevents, in a business sense, the completion of the voyage [1]. But, whether bound or not, if the owner elects to repair he must discharge the cargo for that purpose; the operation is an incident of the repairs; it is not a general average act in the sense above defined, for it is not done under the pressure of danger or for the safety of the cargo; and it is not an operation 'caused or rendered necessary [2]' by the act of putting into the port for safety. On the theory of the law, then, it seems plain that the cost of discharging should properly fall, with the cost of repairs, upon the shipowner.

*Hallett* v. *Wigram* (9 C. B. 580) was to that effect. A shipper sued for the value of goods which had been sold by the master at a port of refuge. The shipowner pleaded that the goods were sold to defray expenses of unloading at the port and repairing damage caused by a storm, to enable the ship to prosecute her voyage, and to prevent her and her cargo from being wholly lost, and for the common benefit of all interested. The plea further alleged that the expenses so incurred in unloading and repairing had exceeded the value of the ship, and contended that the shipowners were only liable to contribute to the amount as general average. On demurrer the Court held that this was not a good defence; no case for general average contribution being disclosed. The damage being accidental the cost of the repairs fell on the shipowner. No distinction was suggested between the expenses of unloading and the expenses of repairs.

In *Svendsen* v. *Wallace* the question did not arise, as the adjusters on both sides agreed in treating the expenses of unloading as general average. But the view of Bowen L.J. may be gathered from the following passage [3]:—'In practice, it has in recent times become common to carry these unloading expenses to general average, both where the repairs of the vessel have been rendered necessary by a general average act, and where they are rendered necessary by a particular average loss. Nor is it necessary to discuss a practice which may have become inveterate and which is found adequate. Still, if strict theory were to be in each case relied upon, such unloading ought, as it seems to me, to be dealt with specifically in every instance by applying to it the two tests I have named. If

[1] See per Collins J. *Assicurazoni Generali* v. *Bessie Morris Co.* (1892) 1 Q. B. 571.
[2] Per Bowen L.J. 13 Q. B. D. p. 85. [3] 13 Q. B. D. p. 87.

necessary for the common preservation of both ship and cargo, the unloading will be in itself a general average sacrifice; see *The Copenhagen*[1]. If not so necessary, it will not in itself amount to a general average sacrifice at all, but it may nevertheless be properly included as a subject-matter of contribution whenever the expenditure is directly caused by some antecedent act of general sacrifice.'

It is true that the Master of the Rolls, in the same case, endeavoured to reconcile this practice of treating the expenses of discharge as general average with the law, by suggesting that the general average act of putting into the port of refuge was a 'going in to repair'; and that the unloading was a part of that act 'done in order to put the ship into such a position that she can be repaired.' But, as already said, an act to be a general average sacrifice must be done for the common safety. That is the doctrine insisted on throughout this and other cases. And, on the hypothesis, after arrival in the port nothing more was necessary for the purpose of securing physical safety. If, then, the putting in was *for repair*, it was still only a general average sacrifice so far as it was a putting in *for safety*. Moreover, if the whole act of *going in to repair* is to be regarded as a general average act, it seems almost impossible to say that the other incidental expenses of repair, such as storage of cargo, are not also general average, as being parts of that act, or consequences of it. Mr. Lowndes, in the last edition of his work on general average, accepted the suggestion of the Master of the Rolls as the true explanation of the adjusters' practice. But he at once (p. 218) proceeded to deduce from it that the expenses of warehousing and reloading ought also to be general average.

We have then, as it seems to me, in this uniform practice of charging the expenses of unloading to general average, a plain instance of conflict between the business view and the theory of the law.

(2) I proceed to the next head of expenditure, the warehousing charges on cargo discharged to enable the repairs to be done. The practice of adjusters is to charge these expenses to the owners of the cargo. And that practice has been judicially approved. Bowen L.J.[2] in *Svendsen* v. *Wallace* said that 'warehousing the cargo is a charge that ought to be borne by the cargo which benefits exclusively by it.' There may at first sight be some difficulty in seeing why these charges for protecting the cargo should not be borne by the shipowner, on the ground that they save him from responsibility for the damage which the cargo might otherwise sustain. It might be argued that the shipowner has by

[1] 1 Chris. Rob. 289. [2] 13 Q. B. D. p. 89.

his contract undertaken to deliver the goods at their destination in good order, unless he is excused by the express or implied exceptions. And that the loss or damage which might happen to the goods after landing (say by theft, or exposure to rain), would not be a loss *proximately* by the perils of the sea which had rendered the unloading necessary. Also that it would not be covered by other exceptions in the contract, if means of protecting the goods had been available. The explanation, however, seems to be that the shipowner has been *prevented* by the perils of the sea from completing the voyage, unless he first discharges the cargo; and as the contract contemplates that the voyage shall be completed, and indeed requires the shipowner to complete it, it follows that, having regard to that contract, the discharge is a necessary consequence of the accident by perils of the sea [1].

That being so, the shipowner is not liable under the contract for the consequences to the cargo of the discharge; and though bound to do his best to mitigate the effects of the misfortune which has thus befallen the cargo, he only has to do so on behalf of the owner of the cargo, and at his own cost [2]. The rule as to the expenses of storage adopted in practice, therefore, seems to be consistent with the law.

But is that rule a fair rule, as between the owners of different parts of the cargo? It frequently happens that only part of the ship's cargo need be discharged to enable the repairs to be done. In such a case the risks and expenses consequent upon the discharge fall wholly upon those goods; while the benefit of continuing the voyage, which has been thus procured, is shared by the owners of the other parts of the cargo, without risk or expense. Moreover, it may be a matter of choice with the master as to which goods he will discharge; he may have it in his power to put the risk and expense upon one part of the cargo, or upon another part, arbitrarily.

The case is in these respects very analogous to that of a jettison, or to an exposure of part of the cargo on the shore, or in lighters. A benefit to the whole is procured at the expense of a part. Do not the grounds of justice and policy which in those cases require that all shall be put upon a footing of equality, apply also to the case we are considering? It would seem that these expenses should either be treated as general average, or should be at least contributed to by *all the cargo-owners*. And as the shipowner is also interested in the safe arrival of the cargo, in respect of his freight, there would

[1] See *Montoya* v. *London A. Co.* 20 L. J. Ex. 254, cf. *Pink* v. *Fleming*, 25 Q. B. D. 396.
[2] See *Notara* v. *Henderson*, L. R. 7 Q. B. 225, p. 235; Cargo Et Argos L. R. 5 p. c. 134; *Hingston* v. *Wendt*, 1 Q. B. D. 367.

be no hardship in making him contribute also, at any rate in respect of the freight.

But though considerations of policy and justice lead us to that conclusion, the legal theory does not. Here, as before, the fact which prevents the warehousing expenses being treated as general average is the absence of any common danger. The expense is not incurred for the *common safety*, it can at most only be said to be in furtherance of the common voyage. And that is not, with us, a sufficient ground.

(3) Now as to the third group of expenses, those of reloading the cargo after the ship has been repaired. These are in practice charged to *freight*. The view taken being that they are incurred for the purpose of earning the freight by completing the voyage. That they cannot be charged to general average was finally determined by the House of Lords in *Svendsen* v. *Wallace*; although the view was taken that the discharge of the cargo had there been necessary for its safety. The Court of Appeal had already come to the same conclusion on the view that the unloading was merely for repairs.

The question who ought to bear the reshipping expenses did not there arise, except in that limited manner, that is to say, whether or not they were general average; but Bowen L.J. expressed the opinion that the 'charges of reloading ought in principle to fall upon the freight, or else upon the freight and the ship together, if the two interests are severed.'

These expenses, as the same Judge pointed out, are 'a loss caused by the captain's decision to repair his ship, and to unload and reload the cargo for that purpose' (13 Q. B. D. p. 89). They are expenses incident to the repairs which the shipowner, as carrier, was bound to undertake; and which he has undertaken in order to perform his contract of carriage. Having repaired the ship, he is by his contract bound to put the goods on board and carry them forward. Where, indeed, as in *Atwood* v. *Sellar*, the repairs have been necessitated by a general average sacrifice, so that the cost of repairing at the port of refuge is a consequence of that act, these incidental expenses are chargeable to general average. But where the cost of repairing falls on the shipowner only, so too should the expenses naturally incident to that. The only alternative, that they should be treated as general average, has been negatived.

Whether the shipowner can claim indemnity against these charges from his underwriters on freight is another question; a question which cannot properly be determined until after the enquiry upon whom, *independently of insurance*, the expenses ought to fall.

But the practice of adjusters has been to debit the charges to freight directly; not to the shipowner first, and through him to his underwriters on freight. And thus it has come about that, where some of the freight has been paid *in advance*, part of these charges is debited to the cargo-owners (or their underwriters), as being interested in that prepaid freight. A result which will be seen to be wrong if the primary liability of the shipowner be recognised. Freight is at the present day very commonly paid in advance, either wholly or in part, so that this treatment of the matter is of serious importance. That the practice is erroneous is clear, if the above statement of the law is right.

This point has not come very distinctly before the Courts; but in *Svendsen* v. *Wallace* the judgment of the House of Lords proceeded upon the assumption that the whole of the reloading expenses would be borne by the shipowner, although part of the freight had there been paid in advance. Lord Blackburn, though fully aware of that fact, said, 'If the £450 which is the cost of reshipping is properly charged to freight the defendants (the merchants) are not liable to pay any portion of it.'

The difficulty which has apparently given rise to the prevailing practice is that the shipowner who has received part of the freight in advance, and therefore has insured with respect to part of the freight only, viz., that which remains at risk, is not in a position to charge the underwriters on that remaining freight with the whole of the reloading and outward expenses. Those underwriters may well claim that these extraordinary expenses have been partly incurred by the shipowner in order to perform the service for which he received the *prepaid* freight; and on that he has paid no insurance premium. But this is no sufficient reason for putting that part of the expenses upon the cargo-owner. He has not by paying the freight in advance undertaken to bear any part of the cost of bringing the goods to their destination. And the accident which gave rise to the expenses has not altered his right to have the voyage completed.

If, however, the view were taken (as I would think erroneously) that the accident *has* altered the rights of shippers, then though it is no doubt true that a shipper who has paid freight in advance has, to that extent, a greater interest in the completion of the voyage than another shipper of similar goods who has not paid in advance (for he is entitled to have them at the destination upon making a *pro tanto* smaller payment), still his interest is greater only to that extent. The justice of the case therefore would require that *all* the cargo-owners should contribute; the difference in interest being allowed for by adding the freight advanced upon

any goods to the value of those goods. On this view the contribution by cargo should not depend upon whether any freight has been advanced or not. If the cargo-owners are not entitled to have their goods carried on, they are all interested, as well as the shipowner, in making some sacrifice in order to get the voyage completed with the goods on board. In short we are led, *on this view*, to the conclusion that the reloading and outward expenses should always be borne by a contribution among the cargo-owners in respect of their goods, and the shipowner in respect of his freight still at risk.

Summing up then, with regard to these three groups of expenses, we find:—(1) That the adjusters' practice of making the expenses of unloading general average is not justified by the law.

(2) That their practice of charging storage expenses to the owners of the cargo discharged agrees with the law; but that there are strong reasons for considering the law and the practice to be unjust, and for requiring contribution to those expenses by all the cargo-owners, if not also by the shipowner.

(3) That the practice of charging the reloading expenses to freight agrees with the law so far as they are thus charged to the shipowner. But that the practice of making those who have paid advanced freight contribute, is not justified by the law; and can only be justified by a view which requires that all the cargo-owners should contribute.

These results seem to me very remarkable. As to (1) and (3) English law and English practice are in conflict; while the practice as to (1) agrees with, and as to (3) points towards the foreign rules, which I shall presently discuss. As to (2) the law and the practice agree, but are both unjust, and seem to require alteration in the direction of the foreign view.

## II.

If we now turn to the rules which obtain on this subject abroad it will be found that they are practically uniform, and that they everywhere differ both from English law and English practice. Lowndes, in his book on general average (4th ed. 1888), compared and tabulated the rules in seventeen European and American States; and his table shows that in all those States, with the doubtful exceptions of Spain, Peru, and Chili, substantially one view has been adopted. The expenses of putting into and coming out of a necessary port of refuge, including the cost of unloading, warehousing, and reloading the cargo, are all treated as general average. And, except in France, so also are the wages and keep

of the crew during the stay at the port. No distinctions are made between cases in which the putting into port, or the need of repairs, has been necessitated by accident and those in which it has been the result of a sacrifice. Some minor distinctions occur; e.g. in the law of Norway, putting in owing to 'pursuit of an enemy, contrary wind, ice, falling short of provisions, or other similar cause,' is treated differently from a putting in owing to damage which renders the ship unseaworthy; and in the Dutch Code, damage done to the cargo by discharging is only treated as general average when the discharge takes place in a manner unusual at the port. But apart from such smaller points, there is in practice a broad agreement in the rule I have stated.

I say *in practice*, because when one examines the Codes in which in most countries the law is expressed they do not seem always to to bear out the rules actually adopted. Despite the formal expression of the law in the Codes, practice often departs from the law abroad, as much, or more than it does in England. For example, the French Code (s. 400) includes in general average, 'damage voluntarily sustained and expenses incurred after express deliberation for the common good and safety of the ship and cargo.' But it is expressly declared by s. 403 (3), that 'expenses resulting from the putting into a port of refuge if occasioned by the accidental loss of such articles' (cables, anchors, sails, masts or cordage) 'or by the need of victualling or to repair a leak' are to belong to particular average. Notwithstanding this, Lowndes (p. 377) found that the practice in France is to charge all the expenses consequent on putting into a port of refuge to general average, as already described, when the putting in has been to repair damage which has rendered the ship *unnavigable*. And I gather that this practice has sometimes, if not always, had the support of the French Courts.

Similarly, in Spain the expenses of putting into a port are, it is said (Lowndes, p. 561), treated as general average, when the putting in is necessitated by general average damage, though by s. 821 of the last Code (1805) it is provided that 'the expenses of the putting into a port of refuge are always to the shipowner's or lessor's account:' while s. 822 puts the cost of discharging for repairs on the shipowner; and s. 823 makes him responsible for the custody and care of the discharged cargo, except as against *fuerza mayor*.

And in Portugal the practice is apparently even more contrary to the Code; which contains a provision (s. 1612), similar to that of the Spanish Code, charging the expenses of entering a port of refuge to the owner (Lowndes, 3rd ed. p. 96).

The discrepancy between theoretical law and practice appears to

be of old standing in France. Emerigon, writing in 1783, treated the subject with his usual conciseness and clearness. Summing up the authorities, from the Roman law down to the Ordinance of Louis XIV, of 1681, he said[1], 'It results from these texts, (1) That expense incurred and damage suffered are not general average, except in the case where they have been incurred voluntarily for the common safety. It is necessary that the act of man should have concurred with the accident; there must have been a forced will. (2) It must have been a question of shunning an imminent danger. A panic would not excuse a captain in making a jettison without being forced to it by a real danger. Still prudence does not allow him to wait the last extremity.' An exact statement of the doctrine which has led to our English position.

Later on[2] he treats of expenses at a port of refuge. After showing that the Roman law and other authorities did not allow contributions to the cost of repairs, he cites the following passage from Ricard (négoce d'Amsterdam): 'When a vessel is forced by tempest to enter a port to repair damages, if she cannot continue her voyage without risk of being entirely lost, the wages and subsistence of the crew from the day it has been resolved to seek a port for repairs to that of her departure therefrom are carried into general average, together with all the expenses of discharging and reloading, anchorage and pilot dues, and all other charges and expenses caused by this necessity.'

To this Emerigon adds, 'Such is pretty nearly the jurisprudence of our Admiralty. . . . . But the expenses and cost of the repairs, the price of the masts, sails and other rigging it has been necessary to purchase are not so admitted. Still, if there has been an excessive value in all these objects either from a scarcity of workmen or from dearness of timber, rigging and other materials, this surplus of price would enter into general average.'

He goes on, '*It is true the law above cited is contrary to our jurisprudence.* But if the vessel injured by tempest were not repaired in the port of repose she would remain unnavigable; this would bring the most serious prejudice to the cargo. It is then a question of expense incurred for the common good and safety.'

This persistence of practice, in spite of inconsistent theory, and in spite of contrary enactments, is very significant to show how strong has been the opinions that justice, or convenience, require a treatment of the matter different from that required by the legal view. Moreover we not only have examples of this conflict between Code and Practice, but in some of the modern Codes we find a

[1] Chap. XII. 39. 6. [2] Chap. XII. 41. 6.

corresponding conflict within the Code itself. The practical view seems to have been grafted upon the legal theory, with perhaps some sacrifice of logic.

Thus the German Code (adopted in 1862) defines (Art. 702) general average as, 'all damage intentionally done to ship or cargo, or both, by the master or by his orders, *for the purpose of rescuing both from a common danger*, together with any further damage caused by such measures, and also expenses incurred for the same purpose.'

Then by Art. 708 (4) it provides that 'When the ship, in order to avoid a common danger, threatening ship and cargo in case of continuing the voyage, is run into a harbour of refuge, particularly where the running in is for the necessary repairing of a damage which the ship has suffered during the voyage,' the cost of discharging, warehousing, and reloading shall belong to general average, if the cargo has to be discharged 'on account of the motive which led to the putting into port.'

That position, if I rightly understand it, is exactly the one which our Courts held to be untenable, in *Svendsen* v. *Wallace*[1]. For it adopts the 'common danger' principle as essential, and yet makes the expenses at a port for repairs general average, though incurred after ship and cargo are in safety.

In the United States also the law appears to differ from our law in the same way, though professedly based on the same principle of 'common safety[2].'

In England we have parted company from other maritime communities; but our Text Books and Law Reports show that what we may call the Continental view has only been dissented from by our judges in quite modern times, and after very remarkable fluctuations of opinion. In *Da Costa* v. *Newnham*[3] (A. D. 1788), Buller J. cited a passage from Beawes, showing the law in foreign countries with regard to expenses at a port for repairs, in the sense already stated, and added, 'I do not know that this point has ever been settled in England.'

In *The Copenhagen*[4] (A. D. 1799), and *The Gratitudine*[5] (A. D. 1801), Lord Stowell's judgments seem to show that he was of opinion that expenses incurred for the common benefit at a port of refuge should be treated as general average.

In 1802 the first edition of Abbott on Shipping was published; and the view there expressed was that, where the cost of repairs at a port of refuge falls on the shipowners, they ought also to bear all the expenses accessory to those repairs; it being their duty, so far

[1] 13 Q. B. D. 69; 10 A. C. 404.
[2] Phillips, Insur. cf. ss. 1270, 1320, 1326; Lowndes, pp. 606, 620, citing Gourlie.
[3] L. T. R. 407. [4] 1 C. Rob. 289, p. 294. [5] 3 C. Rob. 240, p. 264.

as in them lies, to keep the ship in good condition during the voyage [1].

On the other hand Stevens, who first published his book on Average in 1813, laid it down (p. 25) that 'all extra charges incurred for the general good on putting into a foreign port in distress [1], ought by the common law to be made good by a general contribution.' He cited *Da Costa* v. *Newnham*, which is, however, no authority for the point, and referred to the foreign laws.

But he further spoke of a 'practice of Lloyds,' and of 'the customary decision of the Registrar and merchants in such cases, that all the charges incurred expressly for the general benefit are to be placed to the general average; those incurred for the preservation of the goods to the cargo; and the outward charges whereby the ship is again set forward on her voyage, to the freight [2].'

We here evidently have traces of the practice which has ever since prevailed in England. And in Benecke's Principles of Indemnity, published in London in 1824, the practice as it at present exists is described and spoken of as 'so far sanctioned by custom that an attempt to correct it would meet with great opposition' (p. 198). Benecke did not, however, regard the practice as correct.

In January, 1815, the matter came before the Queen's Bench in the case of *Plummer* v. *Wildman* [3], and Lord Ellenborough and Le Blanc and Bayley JJ. decided that the expenses of putting in to a port of refuge, and of landing and storing the goods during repairs, and of reloading them afterwards, were all chargeable to general average. And not only these incidental expenses, but also the cost of the repairs was allowed in general average; the only limitation being that any benefit resulting to the ship from the repairs, beyond the prosecution of the voyage, was to be deducted.

The damage there had been caused by a collision, by which the ship's 'false stern and knees were broken, and the master was in consequence obliged to cut away part of the rigging of her bowsprit, and to return to Kingston (the port of departure) to repair the damage sustained by the accident and the cutting away.'

The decision went to the fullest extent of the continental view. And it was based on the ground that, as all were equally benefited by the removal of the ship's incapacity to continue her voyage, it was reasonable that all should contribute towards the expenses of it.

But, within four months, the authority of the case was qualified

[1] See the passage set out in Shee's note, Abbott, Eleventh Edition, p. 533.
[2] See also *The Copenhagen* (1 C. Rob. 289) where it was referred to the Registrar and merchants to enquire as to the existence of a rule of practice.
[3] 3 M. & S. 482.

by a reference made to it in *Power* v. *Whitmore* [1], which came before the same three judges in May 1815. Lord Ellenborough is reported to have spoken of it as a case in which 'the master was compelled to cut away his rigging in order to preserve the ship and afterwards to put into port to repair that which he sacrificed.' And this has in recent years been taken as the explanation of the decision.

It is, however, impossible to read the judgments in *Plummer* v. *Wildman* [2] as depending upon the fact of an original voluntary sacrifice. The language, especially of Lord Ellenborough, is too clear. And the decision was that *all* the expenses necessary to enable the ship to prosecute the voyage, including the accidental repairs, were to be general average. And though the case is now of no authority, it was evidently treated as an authority by Lord Tenterden, who had been counsel in *Power* v. *Whitmore*, when the fifth edition of his book was brought out in 1837, under the editorship of his son. The passage in the earlier editions to which I have referred above was then omitted, and a new passage was inserted (p. 347) giving the effect of the decision in *Plummer* v. *Wildman*, so far as it related to the expenses of unloading, warehousing, and reshipping, without any suggestion that the ruling had been qualified. Lord Tenterden was then alive, and it is quite improbable that these changes were made without his sanction.

Again, a few years later (1848), Arnould published his work on Insurance, and cited [3] *Plummer* v. *Wildman* as an authority for the proposition which he then laid down, generally, that 'when in order to repair the ship it becomes absolutely necessary to discharge the cargo, all the expenses of unloading, warehousing, and reloading it come into general average, because incurred for the joint benefit both of the ship and of the cargo: of the ship, that she may be repaired, and of the cargo that it may be preserved.'

To this we may add that *Plummer* v. *Wildman* has been treated as an authority in the United States, where the law seems to be in accord with that decision [4].

In 1855, again, *Hall* v. *Janson* [5] is another decision that 'the expenses necessarily incurred in unloading and reloading for the purpose of repairing the ship that she may be made capable of proceeding on the voyage' are general average; being 'deliberately done for the joint benefit of those who are interested in the ship and cargo and the freight.'

But meanwhile it had been definitely made clear in *Hallett* v. *Wigram* [6] (A. D. 1850), that the actual cost of accidental repairs must

[1] 4 M. & S. 141. [2] 3 M. & S. 482. [3] Second Edition, 921, § 335.
[4] Phill. Insur. ss. 1300, 1320, 3 Kent 188.
[5] 24 L. J. Q. B. 97. [6] 19 L. J. C. P. 281.

be borne by the shipowner, although the repairs may have been done for the common benefit at a cost exceeding the repaired value of the ship. And in that and the later cases it has been steadily insisted on that a sacrifice or expense to be general average, must have been incurred under circumstances of impending peril.

Finally, as we have already seen, this essential condition was restated with great distinctness in *Svendsen* v. *Wallace*; and the idea of a 'common commercial adventure as distinguished from the criterion of common safety from the sea' was expressly said to be inadmissible.

## III.

It is difficult to resist the conclusion that the expenditures we have been considering cannot logically be treated as general average, *if imminent peril*, threatening the physical existence of ship and cargo, *is to be regarded as an essential condition of a general average sacrifice or expenditure.* But we find that while that theoretical view has been repeatedly asserted, here and elsewhere, practical men nearly everywhere, indeed we may say everywhere, have agreed in ignoring it in relation to some or all of those expenditures.

And the tendency of this practical opinion is rather in the direction away from the legal theory than towards it. The York Antwerp Rules of 1877 (VII), brought the warehousing and reloading expenses at a port of refuge within general average; and (VIII) also the wages and maintenance of the crew during the stay at the port. The corresponding York Antwerp Rules of 1890 go further. Rule X allows as general average the cost of discharging, storing, and reloading, whenever cargo is discharged for repairs which have accidentally become necessary, although the repairs be done, not at a port of refuge, but at one of the ordinary ports of loading or call on the voyage. It is enough that the damage to be repaired shall have been caused by sacrifice or accident during the voyage, so that the repairs shall have been necessary for the safe prosecution of the voyage. And Rule XI makes the wages and maintenance of the crew general average during any detention for such repairs. These rules are unmistakably based on the view that an expenditure *for the sake of accomplishing the voyage*, necessitated by an accident, should be treated as general average.

The idea seems to be that, while the actual cost of repairing accidental damage which has befallen one of the interests concerned should be borne by that interest alone, the incidental expenses necessary to prevent the frustration of the voyage by that accident should be borne by all.

The conclusion seems forced upon us that the legal theory of general average requires expansion. A broader statement of the principle is wanted, extending it to cover extraordinary expenditures which may be incurred to prevent the frustration of the voyage by accidental perils. Accidental damage and losses must lie where they fall; but if we are to be guided by the views of business men, expenses which have become necessary, owing to accident, to enable the safe prosecution of the voyage, ought to be made good by general average contribution, if the prosecution of the voyage is in the interest of both ship and cargo.

And the only satisfactory way of altering the rules on this subject is by legislation. The method of the York Antwerp Rules has been by contract. They have no effect except where they have been expressly adopted in contracts of carriage, and of insurance. Their effect in that way is very large, but it is only partial; and the wider their operation, the more does it become unsatisfactory that cases in which no contract has been made should be dealt with under rules which are condemned by the best practical opinions.

Moreover the method of contract is apt to fail. The contracts may not agree. Some bills of lading may adopt the York Antwerp Rules while others do not. There may be a charter party relating to the voyage which adopts the new rules, while bills of lading for goods shipped under the charter may fail to do so. Or, again, the contracts of insurance may not agree with the contracts of carriage. And even where a particular set of rules is adopted in all the bills of lading, still questions of general average affect the shippers among themselves, and their bills of lading are contracts with the shipowner, not with other shippers. The law of general average governs the right of persons, co-adventurers, who are not all under contractual relations with one another; and the rules of that law must apply where they have not been modified by contract.

Other considerations also point to the desirability of legislation on the subject of general average. More especially the ill-defined state of the law on many points. The cases decided in the Courts have been too few to enable the legal principles to be worked out in that detail which business requires. The matters discussed in this paper afford illustrations, which might easily be added to, of the want of certainty which exists. An uncertainty which sheds no lustre on our jurisprudence, and is unworthy of our position as leaders in maritime commerce.

T. G. Carver.

## LE MARIAGE EN DROIT CANONIQUE[1].

PROFESSOR ESMEIN has produced a most valuable and most readable work. To the industry of an Englishman or a German he has added the lucidity and logical method of a Frenchman; and the result is a book which the reviewer has read with pleasure from cover to cover; and which may be regarded as a nearly complete treatise on the Canon law as to the making and unmaking of marriages, as such Canon law has been usually received in Continental Western Europe, both before and since the Council of Trent. He has not unnaturally failed to handle the one or two peculiarities which distinguish the Canon law as received in England and Ireland from the ordinary Canon law of the West, and he very fairly states that such illustrations as he supplies from the law of the Eastern Church are not matters of independent research, but are taken from the work of Zhisman.

Starting from the early relations of the Christian Church, first with the Roman Empire and secondly with its Teutonic invaders, M. Esmein traces the growth of the Church's control, first by counsel and warning, secondly by disciplinary action over penitents, and thirdly by the external jurisdiction which Christian Kings conceded to its Courts, and then the gradual waning of the same control as the lay Courts reestablished their jurisdiction, not however over marriage with the old heathen ideas, but over an union and according to principles and methods which had been entirely changed by the spirit of Christianity.

As to the period of growth and the stationary period M. Esmein is full, precise and, as far as the reviewer can dare to judge, most learned and accurate. The later periods are perhaps less interesting and are less fully treated. In the first chapter the third period which is defined as that of the secularisation of marriage (vol. I. pp. 31–55) is summarily treated, correctly in all probability as far as France and many of the countries of Continental Europe are concerned, somewhat incorrectly as to England at p. 49, and with a total omission of the law of marriage as received in the United States and its very interesting condition in the Spanish countries of America at the present day.

The second chapter traces the development of the Christian

[1] Le Mariage en Droit Canonique, par A. Esmein. Paris: 1891. 2 vols. 8vo. 431 and 391 pp.

theory of marriage upon its double line of growth, matrimony being a sacrament with all the incidents of a sacrament and yet at the same time being a contract and one of the class of contracts made by mere consent, with all the consequences which the Roman law attached to consensual contracts.

The second part of the book takes up the developed theory as it had taken shape at the end of the twelfth century and as it remained substantially unaltered till the promulgation of the decrees of the Council of Trent in the sixteenth century. Chapter i. of the second title of the second part (the divisions are rather cumbrous) deals with the impediments to marriage, divided in the usual way between the absolute impediments (*impedimenta dirimentia*) and those which only oppose an obstacle to the correct solemnization of marriage (*impedimenta impeditiva*); the first as the most important taking the chief place.

The absolute impediments are subdivided: section 1 deals with those of general incapacity (pp. 216–220); and first among them with that rule forbidding marriages between Christian and non-Christian, the rule as to *cultus disparitas*, which though a matter of ecclesiastical custom only (see vol. II. pp. 267, 268), has taken firm hold upon the Church; and is in practice most important at the present day.

The distinction between the marriage of the heathen which is a true marriage, *verum ac legitimum*, but which is not *ratum* and may still be dissolved for certain causes, as for instance, by the conversion of one of the spouses and the refusal of the other to live on in union upon Christian terms, is incidentally elaborated at pp. 220 to 232. The question of polygamous converts to Christianity arises in this connection, and is discussed.

The other impediments of 'general incapacity,' age, impotence, and the already contracted engagements of a previous marriage, religious vows and holy orders are fully and most analytically treated of at pp. 232 to 301.

The very gradual growth of the legislation which prohibited marriage to the clergy and the continuing recognition by the Western Church of the lawfulness of the Eastern rule in this matter are clearly shown.

Section 2 (pp. 302–335) deals with those defects which the author calls defects of consent (*vices du consentement*): that is, actual absence of consent, force, and error as to the identity of the person married, or as to his or her condition, this error being limited to the case where a free man or woman espouses in ignorance a slave. Actual defect of consent seems a simple matter; but the Canonists drew a distinction between external and internal consent which (unless

report is slanderous) is used sometimes at the present day in the Roman Church as an instrument of dissolving ill-assorted marriages without recognising the power of divorce (see however vol. II. p. 209).

Section 3 (pp. 335–343) deals with all the impediments founded on a previous relation between the parties: the most difficult to understand is that of *publica honestas*, which makes an impediment of the previous betrothal of one of the spouses to the kindred (within the prohibited degrees) of the other. Then comes kinship (*cognatio*) which besides blood relationship includes kindred by adoption, i. e. the strict adoption of the Roman law, and spiritual kindred, where the parties are connected through sponsorship at the font (*god-sib*). This most curiously mystical prohibition, though its exuberances were retrenched by the Council of Trent (vol. II. p. 261), still exists in the Canon law.

Affinity by marriage or by sexual relation outside the pale of marriage constitutes the next prohibition. In this connection we may lament that dispensations, though treated of in Part III. Ch. vii. (vol. II. pp. 314–368), are less fully discussed, both historically and as matter of everyday practice, than the other subjects of the work.

Lastly comes a prohibition of the adulterer marrying the woman he has corrupted, if in order to make marriage possible he has killed, or, according to one view, has plotted the killing of the husband (*criminis enormitas*).

The second chapter of this second part is given to the procedure by which the validity or invalidity of a marriage is determined. What is most interesting in this procedure is the difficulty in which the canonists were placed by their ignorance or refusal of *viva voce* evidence and cross-examination. No doubt the latter art has largely improved in quite recent periods: and we can see how even in recent times and in this country the increase of cross-examination coupled with the admission of the parties themselves to the witness box has led to the substitution of evidence for presumption.

With the Canon law (unless there was documentary evidence) it was all presumption or common fame. What the Scotch call 'habit and repute' and the French *possession d'état* was the only matter on which direct parol evidence seems to have been admitted.

In the second volume we come to the effects of marriage both as to the rights of each spouse in the person of the other, and as to the legitimacy of children. Here we have brought out the well-known refinements of the Canon law by which the children of a 'putative marriage,' that is a marriage solemnized with apparent form, may be legitimate, though the marriage itself be void. In the

first chapter it is interesting in view of the *Jackson* case to note that the Canon law held that a husband might for good cause chastise his wife (vol. II. p. 7).

Chapter ii. in this volume deals with Divorce, a subject on which there is not much that is new to be said. It is evident that the Western Church early set itself to prohibit Divorce, and that it encountered great opposition and had in some cases to temper its decrees when dealing with the half Christianized Franks and other Teutonic tribes.

Part III. gives us in Chapters i. and ii. the discussions which led to the reforms made by the Council of Trent, and in Chapter iii. the reforms made by that Council—the great change being that by which clandestine marriages were rendered impossible. As the author says (vol. II. p. 154) marriage from being a consensual contract became a solemn contract—that is, one requiring forms as part of its essence.

In theory this superaddition of necessary form is explained as being a restriction upon the personal capacity of the contracting parties. As one may not marry under the age of puberty, or if madness has deprived him or her of reason, so a subject of the Roman Church is not now capable of contracting marriage except in the presence of his *parochus*, parish priest or deacon, or of some other priest deputed by the parochus or the Ordinary, and in the further presence of two witnesses. As before, the sacrament is celebrated and the contract is made by the spouses. The priest is but a necessary witness (p. 182). He must be there and know what is going on; but he may be an unwilling witness. Still the effect of this reform is enormous. Unless the country is in such disorder that you can kidnap your priest, you must have him there of his own will. Not only will he refuse his presence, unless the proper publications (our banns) have been made; but it will be his duty to do so if the marriage though valid when made ought not for some Church reason to be made, or not to be made at that time or season, or without dispensation. Practically under this system *impedimenta impeditiva* become *impedimenta dirimentia* (vol. II. p. 288).

Chapter iv. gives with much refinement of inquiry the after effects, *répercussions*, of the decree of the Council of Trent. In this chapter and in the next the author has largely availed himself of the judicial decisions which have construed the decree, referring constantly to the reports of causes decided by the standing Congregation of Cardinals appointed to interpret the acts of the Council.

In conclusion four matters of interest may be noticed. It is well known that in pre-Revolution France the place of our writ of

prohibition as applied to an Ecclesiastical Court was taken by the *appel comme d'abus*. But it is not so well known that this appeal lies not only from judicial decisions, but from ministerial or official acts or refusals; and that by such an appeal the act of a priest in celebrating an illegal or invalid marriage might be quashed, and in this way the marriage itself brought within the cognizance of the temporal court, and be by it declared void (vol. I. p. 42).

The origin of our damages for breach of promise may be traced in damages for refusal to proceed from betrothal to marriage (vol. I. pp. 52, 136, 142).

The institution of the Defensor matrimonii (vol. II. p. 292) may have suggested our intervention by the Queen's Proctor. The Defensor has however a wider and higher sphere of duties. It would be well if our Queen's Proctor had the like.

Lastly, the book is full of instances of that division which has cut so deep in the Roman Church, and which explains many of the phenomena of the fifteenth and sixteenth centuries—the division between theologians and canonists (see vol. I. pp. 79, 300, 304; vol. II. pp. 243, 327).

Altogether the book is a mine of interesting information, and its arrangement is excellent.

WALTER G. F. PHILLIMORE.

## REVIEWS AND NOTICES.

**Short notices do not necessarily exclude fuller review hereafter.**

*A Treatise on the Specific Performance of Contracts.* By the Right Hon. Sir EDWARD FRY. Third Edition. By the AUTHOR and EDWARD PORTSMOUTH FRY. 1892. London: Stevens & Sons, Lim. La. 8vo. x and 836 pp.

IF the subject of specific performance does not occupy much space in the reports of judicial decisions published during the last two years, we cannot help thinking that this is partly due to the excellent exposition of the law contained in the former editions of this standard work. Of the new cases which have been reported, a careful use has been made in the present edition, and this, as might have been expected, has been done without any disturbance to the lucidity of arrangement, accuracy of statement and refined sense of proportion, with which the former editions have made us familiar. A text-book writer cannot, as a matter of course, make the law appear more logical or consistent than it is, and the law of specific performance is not satisfactory on all points, but when the difficulties are clearly pointed out, as difficulties, the student is always on firm ground and the practitioner knows that he must be cautious. Such warnings are not infrequent in Lord Justice Fry's book. Thus the unsatisfactory position of the doctrine derived from *Lumley* v. *Wagner*—already referred to in the last edition and since then judicially noticed by the Lord Justice (then Mr. Justice Fry) in *Donnell* v. *Bennett*, 22 Ch. D. 835, 840—is again brought out with increased emphasis (on p. 396—where the words used by Lord Justice Lindley in his judgment in *Whitwood Chemical Co.* v. *Hardman*, '91, 2 Ch. 416, to the effect that he looks upon *Lumley* v. *Wagner* 'as an anomaly which it would be dangerous to extend,' are quoted with approval). In the same way the observations as to the inconsistencies in the course of the authorities on the question, as to how far payment of money may be considered as part performance of a contract, had to be retained in the present edition, *Nunn* v. *Fabian* having in the meantime been followed in *Conner* v. *Fitzgerald*, 11 L. R. (Ir.) 106, notwithstanding Lord Esher's dictum in *Humphreys* v. *Green* (10 Q. B. D. 148, 160).

The question whether the Judicature Acts have extended the applicability of the doctrine of part-performance has been repeatedly discussed by the courts since the appearance of the last edition. The cases are summarised and partly criticised on p. 276, and it is worth while to call attention to the passage as a pattern of terseness and pregnancy of expression.

The paragraphs on the effect of the Married Women's Property Act are another instance of that combination of brevity and accurate completeness which marks the master hand. The author is of opinion that a judgment directing a married woman to do something other than the payment of money can be enforced by attachment, but as yet there is no reported decision on the subject.

The observations on p. 259 with reference to some recent cases, in which

the influence of subsequent correspondence on contracts formed by letters was discussed (*Bellamy* v. *Debenham*, 45 Ch. D. 481, and *Bristol &c. Bread Co.* v. *Maggs*, 44 Ch. D. 616), deserve special attention, and it is to be hoped that the proposition that 'if the letters of proposal and acceptance in fact contain all the terms agreed on at the time and were written with the intent of binding the writers, this complete contract could not be affected by subsequent negotiations not resulting in a new contract,' will not in future be questioned.

The additional note on *Bolton Partners* v. *Lambert* (41 Ch. D. 295) points out the difficulties, both practical and legal, which result from the decision in that case.

The historical survey on pp. 8–15 is a valuable addition. The readers of this REVIEW will already know from Lord Justice Fry's article on 'Specific Performance and Laesio Fidei' (L. Q. R., v. p. 235), that he traces the origin of the equitable jurisdiction relating to specific performance to the ecclesiastical courts and their endeavours to give relief against 'laesio fidei.' An additional note (on p. 716) collects the cases illustrating the adoption of this jurisdiction by the Chancellors.

As regards the statements on foreign law on p. 4, and in the additional note on p. 715, we are compelled to differ from the opinion that the specific enforcement of contracts has a more extensive application in England than on the continent. If we had to express the difference between English and continental law in this respect in a few words, we should say that in England specific performance is granted where damages are not an adequate remedy, whilst on the Continent damages are awarded when specific performance is impossible, and also that the means of enforcement are more varied on the Continent than in England.

As regards French law, our opinion is supported by the following extract from Mr. Demolombe's Traité des Contrats (2nd ed. vol. i. p. 486): 'Il est vrai qu'à Rome toutes les sentences du juge aboutissaient à une condamnation pécuniaire . . . . mais jamais nous n'avons admis en France ces formes de procédé toutes romaines; il faut tenir au contraire chez nous pour règle que le créancier est fondé à obtenir l'exécution même de l'obligation toutes les fois qu'il est possible de la lui procurer.' The well-known § 1142 of the French Civil Code does not in effect prevent any contracts from being specifically enforced except positive and negative contracts relating to personal services. It is true that contracts of the latter kind are in this country enforced by injunction, but this is done in consequence of a decision which, as mentioned above, must be looked upon as an anomaly. Apart from this one exception we are in our opinion safe in asserting that any contract, the specific performance of which can be obtained in England, can also be specifically enforced in France. The French Courts do not threaten the defendant with imprisonment in case of disobedience, but wherever it is possible to do so they authorise the plaintiff by his own act to bring about the result which would have been obtained if the defendant had performed his obligation. Even the 'obligation de faire ou de ne pas faire' may in many instances be enforced in this manner (Code Civil, §§ 1143 and 1144), but most of the cases in which specific performance is ordered in England would be classed under the head of the 'obligation de donner' (to which—as mentioned in the note—Sir Frederick Pollock has called attention). As provided by § 1136 'l'obligation de donner emporte celle de livrer la chose.' In case the defendant neglects this duty the plaintiff may be authorised to take possession 'manu militari' (see Demolombe, l. c., p. 380). It is true that in the case of sales, specific performance is unnecessary as the contract

operates as a conveyance, but the 'obligation de donner' may arise in other ways, e.g. in the case of a contract of letting (see Code Civil, § 1719).

In Germany specific performance may be obtained in a much more extensive manner than in France or in England, and it is not probable that the rule of Roman Law, which converted all claims arising from obligations into money claims, was at any time acted upon in the first-named country. On the other hand, there is evidence dating back to the thirteenth century of the opposite rule having been applied (see *Stobbe*, Deutsches Privatrecht, first edition, vol. iii. p. 228; *Planck*, das deutsche Gerichtsverfahren im Mittelalter, vol. ii. p. 264). Instances of actions, in which the delivery of land or chattels was claimed on the ground of contracts for sale, are mentioned in the Sachsenspiegel, I. 9. § 1 (about 1230) and Richtsteig Landrechts, 19. § 3 (about 1330), and the nature of such actions as actions for the specific performance of contracts is clearly pointed out by Heusler (Institutionen des deutschen Privatrechts, vol. i. pp. 390–394). The plaintiff in earlier times was authorised to take the defendant into his personal custody until he had complied with the order; but in later times a disobedient defendant was confined in the public prison (Planck, l. c., p. 260). As regards the modern German Law, Professor Dernburg in his well-known book on Prussian Private Law (third edition, vol. i. p. 276), states that 'Roman law in its classical epoch assumed that every judgment must be for damages in money and the older conception has still a material influence on the law of Justinian. According to modern law the claim and the judgment must be for specific performance (specifische Erfüllung) as long as specific performance is possible' (see also Forster-Eccius, Preussisches Privatrecht, fourth edition, vol. i. pp. 551, 899). The German Code of Civil Procedure (which since 1879 is in force throughout the German Empire) provides for the enforcement of judgments for the performance of contracts (1) by direct interference with the subject-matter, e.g. by authorising the plaintiff to take forcible possession (§§ 769–771), by allowing the promised act to be performed by a third party at defendant's expense (§ 773), by directing the judgment of the Court to have the same effect as if the defendant had executed an instrument, the execution of which was contracted for (§ 779); (2) by punishing the defendant by fine or imprisonment in case of disobedience (§§ 774–775). In some German States orders may be made for the specific performance of a promise to marry, but such orders cannot under any circumstances be enforced by compulsion, and would in case of disobedience create a claim for damages; orders for the restitution of conjugal rights cannot be enforced by fine or imprisonment unless the local law allows it. Subject to these exceptions any order of a German Court directing a defendant to do or abstain from any act may be enforced as mentioned, and the specific performance of contracts therefore covers a much wider ground in Germany than it does in this country. E. S.

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*The Law and Custom of the Constitution.* Part II. The Crown. By Sir William R. Anson, Bart., D.C.L. Oxford: Clarendon Press. 8vo. xxiv and 494 pp. (14*s.*)

Sir William Anson's Law and Custom of the Constitution is the most valuable treatise which has appeared for years on the English Constitution as it actually exists. The merit of the work as a mine of information cannot escape even the most careless of readers; there is however a possibility that the details with which the book is filled may

conceal, even from intelligent critics, the special gifts of the author as an expounder of the working of the Constitution. It is on these special characteristics that it is worth while therefore in this brief notice to insist.

Sir William Anson displays, in the first place, an extraordinary capacity for research.

No doubt some of our readers will be startled by this assertion. Our author does not pretend to be an antiquarian, and a most unfortunate idea prevails that research, by which is really meant the investigation into, and discovery of, facts not easily ascertainable, means the enquiry into the origin of institutions, and, speaking generally, into the obscure and uncertain phenomena of early history. But if the term be used in its true and rational sense, it will be hard to point to any writer who has shown greater capacity for the carrying out of profitable research than Sir William Anson. His object has been to ascertain not only from books, but, what is often far more difficult, from official records, from the practice of men concerned in carrying on the government of the country, from the careful examination of official forms and the like, how the administration of public affairs in England is actually carried on. No one who has not occasionally attempted a task of somewhat the same kind can tell how difficult is its successful achievement. Officers in the public departments are, it is true, usually gentlemen of far more than average intelligence, and are very ready to communicate their knowledge of official routine and habits to any one who is enquiring with a sincere desire to learn. But persons versed in the practice of affairs rarely have time to explore the principles of the business in which they are engaged. Moreover, the things which to officials are a matter of course are the proceedings, which it naturally does not occur to them to explain, and which yet to an intelligent enquirer most need explanation. There is hardly a page in the Law and Custom of the Constitution which does not make clear some matter of detail which the reader feels he has never before completely understood, and each detail of this kind has, we may be sure, been ascertained by our author through a process of laborious, intelligent, and assiduous research.

The Warden of All Souls, in the second place, possesses the gift of summarising the general effect of lengthy investigation in a few clear expressions.

Writers on the Constitution tend for the most part towards diffuseness. You hardly ever find a constitutionalist who can compress the results—often, we may add, very small results—to which his enquiries have led him. Rare, for example, is the writer who can tell us what he means by an established Church. Our author, on the other hand, knows precisely what he means, and can express his meaning briefly. 'The Church of England,' he writes, 'like the established Presbyterian Church of Scotland, differs from other religious societies in this, that the conditions of membership are endorsed by the Legislature, and cannot be altered without legislative enactment. In this sense the law of the Church is the law of the land. It cannot be altered at the pleasure of the members of the Church. Convocation could not, even with the most ample license from the Crown, alter or repeal any one of the Articles, or vary the rubric settled in the Prayer-book. To do this recourse must be had to the Crown in Parliament.' This single paragraph sums up nearly all that a lawyer need say on a subject which has perplexed lawyers no less than divines.

But the rarest of Sir William Anson's gifts is his capacity for the historical elucidation of Constitutional Custom.

He does not pretend to be an historian: he does not try to do badly and inadequately the work which Hallam and Stubbs have done excellently and fully. On the other hand, he does not try to treat institutions which are the fruit of long historical development as though they had been created yesterday under the direction of modern statesmen and jurists. He neither writes history nor overlooks history. What he does do is to use historical knowledge so far as it elucidates our modern institutions, and so far only. It is this mode of treatment which gives immense importance and extreme interest to the admirable chapter on the Councils of the Crown. It is (if we except Bagehot's account of the Cabinet) quite the most original and best account of Cabinet Government in England which has ever been presented to the public. The intellectual feat performed by Mr. Bagehot of, for the first time, explaining what Cabinet Government really is, cannot from its nature be repeated. But Sir William Anson has certainly explained, as no one before him has ever explained, the steps by which the Cabinet has been developed and the very singular change which has come over the nature of the Cabinet within little more than a century. To most readers, at any rate, the distinction between the outer Cabinet and the inner Cabinet, between the position of a statesman who is a member of a Cabinet, but not one of the efficient Cabinet ministers, and the position of a statesman who, like Lord Mansfield, was a member of the outer Cabinet, but was not a member of the *Cabinet Council with communication of papers*, will come as a surprise. But the new idea when once grasped solves many problems in the constitutional history of the last century which puzzle students, and also suggests many possibilities as to the constitutional history of the future. One thing at least our author has made perfectly clear. The Cabinet, as it is the most important and original, so it is also the most flexible part of the English Constitution; it lends itself to adaptation: it never remains long in the same state. We may doubt whether the Cabinet presided over by Lord Salisbury is quite the same sort of body as the Cabinets presided over by Lord Palmerston; it certainly differs essentially from the Cabinets of Pitt or of Walpole. It is at least conceivable that within the next twenty years the distinction between the outer and the inner Cabinet may again make its appearance. But our space forbids the following out of these speculations. This notice will have attained its object if it convinces those who read it that the Law and Custom of the Constitution, though an admirable law book, is not a book merely for lawyers, but a treatise full of interest for every one interested in political speculation.

A. V. D.

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*La Condition de la Propriété dans le Nord de la France. Le Droit de Marché.* Par J. Lefort. Paris: E. Thorin. 1892. vii and 223 pp.

Monsieur Lefort's treatise on the *Droit de Marché* has at the present day a special interest for Englishmen. The *Droit de Marché* is, in fact, nothing else than French tenant right. In a particular part of France, and mainly in Picardy, tenants have for two or three centuries at least, and it may be for a much longer period, claimed rights over their land exactly equivalent to the rights claimed by Irish tenants. The French tenant claims not to be evicted whilst he pays his rent; he considers his rent on the strict view of his rights as incapable of being raised; he claims the right to dispose of the goodwill or tenant right in the land, which often

amounts to more than the value of the nominal rights of the legal owner. These claims on the part of certain French tenants have no acknowledged legal basis; they are entirely opposed to the whole spirit of French law; yet they are claims which landowners find it best to treat as rights, for they are enforced by popular opinion, by conspiracy, by boycotting, by maiming of animals, by the burning of homesteads, by the murder of land-grabbers, and by the murder of the friends of land-grabbers. From the time of Louis XIV downwards, the French Executive and the French Courts have opposed with the utmost rigour a system of tenure inconsistent with the fundamental principles of French jurisprudence; yet in the contest with a limited number of peasants the French Government has entirely failed. The *Droit de Marché* still exists. If it is dying out at all, which is not quite certain, it is perishing under the influence, not of hostile legislation, but of changing social conditions. All these facts were known to those who have studied Mr. R. E. Prothero's writings. But Mons. Lefort gives an exhaustive description of the whole system of the *Droit de Marché*, whilst Mr. Prothero naturally refers to it only incidentally. The essential fact, however, which both writers bring out is that all the most characteristic phenomena of the agricultural conflict in Ireland have been known for generations in France. From this two inferences at least, which are of considerable importance, may be drawn.

The first and most obvious is that no conflict is so hard to bring to an end as a conflict between a Government and its subjects as to the tenure of land. The French tenant is not divided from his landlord by race or by religion. The tenants who uphold the *Droit de Marché* have never regarded the Government at Paris as an alien power; yet for all this, French tenants have resisted the claims of their landlords, though backed by a despotic Government, at least as vigorously and, we may add, as savagely as Irish tenants have resisted the rights or exactions of landlords who belonged to, or were supported by, the English garrison.

The second and more general inference is that enthusiasts for the historical method are perhaps too apt to assume that similarity in the institutions of two peoples are signs of a common origin. Enquirers sometimes forget that similar circumstances of themselves produce similar institutions. The comparative method is at least as important as the historical method of investigation. A. V. D.

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*Constitutional Legislation in the United States:* its origin, and application to the relative powers of Congress and of State Legislatures. By John Ordronaux, LL.D. Philadelphia: T. & J. W. Johnson & Co. 1891. 8vo. vi and 696 pp.

This work of Mr. Ordronaux purports 'to present in a concrete form' a part of the Constitution of the United States, the part selected being 'the entire system of Federal and State Legislation.' To work out his scheme he gives us a good deal of history and a good deal of political theory, and perhaps these are not kept apart with sufficient distinctness from the main purpose of the work; but the scheme is nevertheless clear and intelligible. The first chapter, on the sources of representative government, states the general theory of popular institutions; the next, on the organization of representative government, gives us the disposition of political power in the United States. The third chapter contains an interesting account of the relations of the States to the Federal govern-

ment. Then we pass to the various legislative bodies, the limits on their powers and the mode of their working, together with the sort of law-making effected by the Supreme Court in judicial interpretations of the Constitution. The last chapter, on the Mechanics of legislation, deals with a topic which does not often meet with the attention it deserves. We are always complaining of the uncouth complexity of the Statute-book and the difficulty of carrying a bill through the House of Commons without the introduction of some unintelligible matter, but the art of law-making has not in England, so far as we are aware, received literary treatment.

Mr. Ordronaux is, as in duty bound, an enthusiastic admirer of the American constitution. To us it seems inconvenient that provisions now more than 100 years old should be unalterable save by a process of extreme difficulty. There should be some *via media* between the exorbitant powers possessed by our own Parliament for altering the institutions under which we live, and the helplessness of the American legislature in the presence of the sacred document of the Constitution. Yet Mr. Ordronaux tells us (p. 209) that 'sixty-six legislative bodies must assent to any proposed amendment before it can form part of the Constitution:' and asks proudly, 'Is there any nation on the globe whose organic law is hedged about and buttressed by such mountains of popular assent as these sixty-six legislative houses represent?' We should hope not. The mountains of popular assent must be an incubus on the operation of the national will.

The fact that our Statute-book represents the current political ethics of successive generations is, to the mind of Mr. Ordronaux, 'a fearful indictment of constitutional as well as political morality:' yet it would seem more in character with genuine democracy that the people's laws should represent the people's opinions at the time and should not be subject to the limitations imposed by the wisdom of remote forefathers.

In some respects, too, the terminology of the book might be clearer: in the section of ch. iii, headed 'Origin of the State,' we are constantly puzzled by changing uses of the word 'State' as signifying sometimes the community, sometimes the disposition of forces in the community, sometimes one of the United States. Prerogative is a word to which an air of mystery may well cling, but the privileges of the House of Commons should not be confounded with their legislative powers (p. 359), nor is it true to suggest that inroads on the prerogative of the Crown were made by the Commons alone.

A good table of contents would be of value to a work in which some chapters contain very miscellaneous matter. But these minor shortcomings do not prevent the book from being an interesting and useful addition to the literature which has grown up around the American Constitution.

W. R. A.

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*A Digest of the Principles of the Law of Contracts.* By S. Martin Leake. Third Edition. London: Stevens & Sons. 1892. lxxxvi and 1164 pp. (32*s.*)

The treatise of Mr. Leake has always commanded a high position in legal literature from the clearness of its language and its happy combination of brevity with exactness. The last edition appeared so far back as 1878. In this new edition the author tells us that 'he has endeavoured to revise the work strictly for the service of the profession, with the single aim of presenting a convenient digest of the leading principles of the law of

contracts as derived from judicial exposition,' abandoning the view, formed when the work was originally prepared, of making it to some extent a students' book. We hardly discover any change, but there is no doubt that Mr. Leake's style and mode of treatment is far better suited to the practitioner than the student, who would in many cases suffer not a little from inability to comprehend matter so closely packed.

Turning from generalities to particulars, we are glad to find that the Married Women's Property Act of 1882 with its bundle of explanatory cases has been quite satisfactorily treated, and the effect of *Palliser* v. *Gurney*, L. R. 19 Q. B. D. 519, *Scott* v. *Morley*, L. R. 20 Q. B. D. 132, and suchlike familiar decisions effectively brought out.

In dealing with *Read* v. *Anderson*, L. R. 13 Q. B. D. 779, however, our author is far from happy. He cites this celebrated, and, as we have always thought, wrongly decided, case on six separate pages, but on only one of them do we learn that Brett M.R. dissented from the judgment of the Court of Appeal, and on none of them have we any notice of the disapproval of it by Manisty J. in *Cohen* v. *Kittell*, L. R. 22 Q. B. D. 689, much less any independent criticism of the author's own. Nor has occasion been taken, in dealing with *Mogul Steamship Co.* v. *McGregor* (1892), App. Cas. 25, to point out its indirect effect upon *Hilton* v. *Eckersley*, 25 L. J., Q. B. 199; but looking to the very recent date of the report of the judgment of the House of Lords as compared with Mr. Leake's preface, we ought perhaps rather to thank him for what he has given instead of blaming him for what he has not.

We have only to add that the index is quite up to the mark, but that a 'table of statutes cited' has been most unhappily withheld.

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*The Institutes of Roman Law.* By Rudolph Sohm, translated by James Crawford Ledlie, with an Introductory Essay by Erwin Grueber. Oxford: Clarendon Press. 1892. 8vo. xxxv and 520 pp. (18*s.*)

The English student of Roman Law has for some time past been provided with admirable commentaries upon the institutional writers, and even upon certain portions of the Digest at large. He has however still felt the need of some such systematic exposition of Roman Private Law, as a whole, as is obtained in Germany from the works known as 'Institutionen.' This need the Clarendon Press has at length supplied. Professor Sohm's reputation rests mainly upon his researches into the early Teutonic codes; but his excursion into the domain of the specialists in Roman Law has been more than justified by its results.

Of the numerous 'Institutionen' which compete for the 'cupida legum iuventus,' some are repulsively dry in treatment, one of the best (Puchta's) is unfinished, many tediously repeat their predecessors, others are too difficult for the beginner. Sohm's work is free from all these defects. Its appearance in 1884 was an event in Academical circles, and its continued success is attested by its already having attained a fourth edition. The work is essentially fitted to arrest and retain the attention of the reader, and Mr. Ledlie has been very successful in preserving in his translation much of the freshness and force of the original. His task has been no light one, as he explains in his preface; and it is more easy to criticize some of his renderings (e. g. of 'Forderungsrecht' by 'obligatory right') than to improve upon them. Certain details of Sohm's own method are no doubt

open to serious question; but the student who has some knowledge of the subject from other sources will perhaps hardly need to be warned that the inclusion of 'Procedure' in 'The Law of Property' is an eccentricity to be excused only in so far as it is suggestive of a new point of view.

The 'Introductory Essay' by Dr. Grueber must not be passed over without separate mention. It contains a survey of the fortunes of Roman Law on the Continent and in this country which could hardly be found elsewhere. The writer has turned to happy account his exceptional opportunities, as a graduate of Munich and a Professor at Oxford, to produce a most interesting monograph, in which he traces the development of the study from Italy, through France to Germany: from the glossators and post-glossators, through the humanists of the renaissance, the apostles of the Law of Nature, and the advocates of the Historical Method, down to the modern severance of 'Deutsches Privatrecht' from the 'Pandekten.' Dr. Grueber then proceeds to enquire how far a similar process is observable in England, and to account, with unusual mastery of the authorities, for the character of the recognition which the study has obtained amongst ourselves. We hope to return hereafter to a work which deserves a fuller notice than its recent appearance at present permits.

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*A Treatise on the Law of Merchant Shipping.* By DAVID MACLACHLAN. Fourth Edition. London: Sweet & Maxwell. 1892. La. 8vo. xlvi and 1075 pp. (£2 2*s.*)

THIS book has been before the public for upwards of thirty years, and has established its position as a standard work upon merchant shipping law. It is remarkable for the freedom and energy with which the author criticises judgments with which he disagrees. Examples of his method will be found at pp. 679 and 690 of the present edition. Recent cases show that the ancient controversy between the 'beneficent' (Maclachlan, p. 690) jurisdiction of the Admiralty Court and the Common lawyers has not entirely died out. The present Master of the Rolls still guards the floodgates of that jurisdiction, which he appears to agree with Lord Coke in thinking by no means beneficent (see '92, 1 Q. B. 299). It is worthy of notice that the present edition of Mr. Maclachlan's book exceeds in bulk its predecessor by forty pages only—a subject of congratulation in a work upon so large a subject. And this increase in bulk is partly due to the ever increasing number of statutes, which, as is intimated in the preface, are rapidly becoming a scandal to the legislature. Mr. Maclachlan's is a 'general' treatise, and in it the reader will find no extended reference to the knotty subjects of insurance and pilotage authorities. The exclusion of these topics has, at least, the merit of lightening the volume. As to smaller matters we remark: that there has been no Wreck Commissioner for some time past, though p. 299 would lead the reader to suppose that a successor to the late Wreck Commissioner had been appointed; 26 Vict. c. 24, cited p. 70 as to Colonial Vice-Admiralty Courts, has been repealed by 53 & 54 Vict. c. 27; *The Urania* is not to be found (see Ta. Ca.) on p. 373, but is to be found at p. 673; to *The Urania*, 10 W. R. 97, much discussed in a recent case, there is no reference; the suggestion, p. 294, that in an ordinary towage the crew of the tow are under the orders of those on board the tug is not in accordance with the law as laid down in *The Niobe*, 13 P. D. 55, 59, or as subsequently stated by Mr. Maclachlan (p. 296), referring to *The Christina*, 3 W. Rob. 27 (which case, however, is incorrectly cited as *The Christiana*);

*The Mary*, 5 P. D. 14, is a doubtful authority for the point of law to establish which it is cited on p. 297; the passage as to a certificate for costs being necessary where County Court actions are brought in the High Court requires a reference to *Garnett* v. *Bradley*, 3 Ap. Ca. 944, and cases like *The Asia*, '91, P. 216, which have followed it; *The Kong Magnus*, '91, P. 223, seems to need mention on p. 334, and the mode of citing the same case p. 616, '1 P. D. (1891) 223,' is not convenient; the well-known *Missouri Steamship Co.* case is not omitted from the L. R., as the reference (p. 405) might lead the reader to suppose. Lastly, in the index under tit. 'Negligence,' we expected to find some reference to the much discussed subject of shipowners exempting themselves by bill of lading from liability for the negligence of their agents.

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*The Law of Trading and other Companies*, formed or registered under the Companies Act 1862. By EDWARD MANSON. London: William Clowes & Sons, Lim. 1892. La. 8vo. cxxviii and 966 pp. (35*s.*)

THIS book is a Dictionary of Company law. It is perhaps unique among law-books in that it boasts no index. This is because the book is itself an index. So far as we can see it is a good and a well-arranged index. Some idea of its exhaustiveness may be conveyed by the fact that, as we have computed, there are about four thousand cases cited. They are cited in the most convenient fashion, with the date and an indication of the name of the Judge, and with all the references to contemporaneous reports given in the Table. Indeed, Mr. Manson's work strikes us as one of almost preternatural industry. We have found hardly a loose joint in his harness, and we think there is a great deal to be said in favour of a Company book, upon the dictionary principle, to be useful in the hands of secretaries and managers. Mr. Manson has compiled, with infinite pains, a digest of Company law—both statutory and judge-made—which is at once accurate and complete. The headings and catchwords are well chosen, and the cross-references are abundant. The single deviation from accuracy which we have noted is the reference on p. 360 to secs. 211 and 212 of the Companies Act 1862, without a sign to show that the sections have been repealed by the Statute Law Revision Act 1875. Of course we do not expect to find in a digest like Mr. Manson's the independent criticism and forcible reasoning which is to be found in the pages of Lord Justice Lindley and Mr. Buckley. But by two samples Mr. Manson has proved that he is capable of forming a logical judgment of his own; we mean by his notes on the 'Waiver Clause' in prospectuses, the only sin of which excursus is that it is too full of legal maxims, and on Founders' Shares, in the mischievous character of which we cordially concur. These are enough to show that Mr. Manson is no mere maker of digests: he is equal, as our pages have proved, to much higher efforts. Nevertheless his main effort in the book before us has been to present a convenient digest, and in that effort he must be adjudged successful.

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*Leading Cases and Opinions on International Law.* By PITT COBBETT. Second Edition. London: Stevens & Haynes. 1892. 8vo. xxiv and 385 pp.

THE second edition brings this useful work thoroughly up to date, and contains, among other new matter, appendices dealing with the Behring

Sea Controversy and the Newfoundland Fisheries Question. Students will find the book of especial value as presenting information on all branches of International Law with a clearness and method which in most works on this subject are noticeable by their absence: indeed, apart from the form of Professor Cobbett's book, it is only in this respect that it now differs from an ordinary text-book of International Law, the increase from the 263 pages of the first edition to the 385 of the second, caused by a general amplification of the notes appended to the cases, bringing it into the position of an independent rather than an accessory treatise. The author had two alternatives before him: by curtailing the number of 'leading' cases, and compressing the notes, of his first edition he might have produced a book of the greatest service as a key to such works as Wheaton and Hall: he has chosen, however, to expand it into a volume which for many readers will doubtless altogether replace more weighty tomes.

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We have also received:—

*The Annual County Courts Practice*, 1892. Founded on Pollock and Nicol's and Heywood's Practices of the County Courts. By His Honour Judge HEYWOOD. Two vols. London: Sweet & Maxwell, Lim.; Stevens & Sons, Lim. 1892. 8vo. Vol. I, xxxvi and 946 pp.; Vol. II, xiv and 438 pp. (25*s.*)—The current edition of the Annual County Court Practice is of more than usual importance, embodying as it does the alterations and amendments of the County Court Rules and Scales of Costs of 1892. The most important change perhaps made by these rules was the entire recasting of the rules of Admiralty County Court Practice with the view to securing uniformity in all Courts, but the considerable revision in the Scales of Costs will probably require the more immediate attention of the ordinary practitioner. The whole of these new rules have in the edition before us been worked into the text with the most careful accuracy, and the useful index and excellent arrangement of the work enable the advocate with ease and rapidity to ascertain the rules of practice on difficult points which crop up in the course of a case. The recent decisions (especially that of the C. A. in *How* v. *L. & N. W. Ry. Co.*, '91, 2 Q. B. 496) which have partially cleared up the vexed questions as to appeals from interlocutory orders are noted with due care, and we can find no recent cases of any importance on County Court Practice which have been omitted from this edition except those which have either like *France* v. *Dutton*, '91, 2 Q. B. 208, been met by amendments in the rules, or, like *Dod, Longstaffe & Co. ex p. Lamond*, 21 Q. B. D. 242, been practically superseded by still more recent authorities.

S. H. L.

*Rogers on Elections. Part II. Elections and Petitions.* Sixteenth edition. By S. H. DAY. London: Stevens & Sons, Lim. 1892. 8vo. xxxii and 900 pp.—A book which is in its sixteenth edition needs no words from us to show how highly it has been and is appreciated by practitioners. 'Rogers on Elections' has made a place for itself in the lawyer's library. That place it well deserves to keep, while it is in such good hands as Mr. Day's. It is a mine of information on all things connected with Elections, whether Parliamentary, Municipal or Local Government. We have detected no omission of any fact, either in statutory or in what is called 'judge-made' law. The only quarrel we have with Mr. Day is that he is a trifle chary of expressing his views upon burning questions which remain undecided. There is, for instance, no answer attempted in these pages to

the question which is causing many searchings of heart to-day, When do the expenses of an election begin? All that Mr. Day does is to refer to the few cases which have been decided thereanent, without attempting to deduce rule or principle from the decisions.

*Les destinées de l'arbitrage international.* Par E. ROUARD DE CARD. Paris: Pedone-Lauriel. 1892. 264 pp.—At the present moment when Great Britain is involved as a party in two momentous matters about to be submitted to arbitration, a book on the progress of this new and bloodless method of settling international disputes will interest many readers. The author, who is a Professor of the Law School of Toulouse, examines the different disputes in which recourse to arbitration has been had, the nature of the movement in its favour, and the effect of clauses in treaties providing for arbitration in case of disputes in the future.

As regards the disputes which have been arranged he finds they can be grouped as follows: five as to the fixing of frontiers, two as to the right to possession of territory, five as to the seizure of vessels and confiscation of cargo, three as to violent and arbitrary acts towards foreigners, one as to rights of navigation, two as to rights of fishery, and one as to the settlement of an account. These are all matters involving material interests and in which the sovereignty or independence of States is not concerned. In fact M. Rouard de Card is of opinion that, though several American States have taken the engagement towards each other to submit their differences to arbitration, not much progress is to be expected wherever the independence or sovereignty (we might on our own account add dignity) of States is concerned. He says:—

'Il est évident que les Etats signataires de ces traités n'hésiteront pas à décliner la compétence des arbitres toutes les fois que leur indépendance et leur souveraineté se trouveront mises en question. Pour les contraindre à respecter leurs promesses, on devra recourir à l'emploi de la force, mais alors la guerre, qu'on aura voulu prévenir, deviendra nécessaire. Par conséquent, à quoi aura servi la conclusion des traités d'arbitrage permanents! Nous nous bornons à rappeler l'exemple de Salvador et du Guatémala, entre lesquels a éclaté une lutte sanglante, malgré l'existence d'un pacte d'union. Dans la pratique, la justesse de ces objections a été si bien reconnu que les diplomates ont cru devoir modifier la formule des traités. Les dernières conventions portent, en effet, que l'arbitrage cesse d'être obligatoire, lorsqu'il s'agit de questions "qui d'après le jugement exclusif d'une des nations intéressées, compromettraient son autonomie ou son indépendance."'

A recommendation of the author as regards procedure is to regulate it minutely beforehand or specifically to refer the arbitrators to the rules drawn up for international arbitration by the Institute of International Law.

We remark a precedent that may be worthy of more attention in the future than it has yet met with. It is that a difference between France and Nicaragua as to a seizure of arms on board the French steamer *le Phare* was submitted to the French Court of Cassation. It is doubtful whether many States would care to submit their differences to the Law Courts of their adversary, but submission to the Court of an independent State may be a form in which this precedent may be followed.

*Code de Commerce italien.* Traduit, annoté et précédé d'une introduction. Par EDMOND TURREL. Paris: Pedone-Lauriel. 1892. xxxvi and 306 pp.—This is the fourth volume of a series of translations of foreign codes in course of publication by the enterprising publisher whose name figures above.

The Italian Commercial Code of 1882 is one of the most recent, and has therefore had all the advantage over its predecessors of coming after them. The translator says of it that taking it all in all it is perhaps the best which has issued in late years from the legislative activity of Europe. Its preparation, he tells us, occupied thirteen years, and what was done during that period is instructive as to how Continental Codes are made. In 1869 the Italian Government appointed a first commission composed of jurisconsults, magistrates, and merchants, who held 175 plenary sittings, without counting sub-committee meetings. In 1872 this Commission terminated a Preliminary Draft with an *exposé de motifs* in four big volumes. This Draft was submitted to the Judicial bodies, Chambers of Commerce, and Universities. Later on a fresh extra-parliamentary commission took it in hand, and in 1887 Signor Mancini presented it to the Senate, which adopted it in 1880. Adoption by the Chamber of Deputies followed in 1882, and a last commission under the official chairmanship of the Minister of Justice gave it the finishing touches in view 'd'en faire disparaître les antinomies, d'en améliorer la rédaction, de le mettre en harmonie avec les autres parties de la législation commerciale, et d'y ajouter des dispositions transitoires et réglementaires.'

The translator gives few notes and his index might be more redundant, but the translation so far as we have tested it seems careful and clear.

*Code de Commerce chilien.* Traduit et annoté par HENRI PRUDHOMME. Paris: Pedone-Lauriel. 1892. lxii and 425 pp.—This is another of the series referred to in the preceding notice. A feature of this volume is that it contains notes comparing the Chilian law with that of France. The Code in question came into force in 1867. It is hardly therefore one of the new Codes. A fact to note is that the Chilians in 1866 set the example of abolishing the institution of Tribunals of Commerce, an example in which they have since been wisely followed by Spain and Italy. There is a pretty full index to this volume.

*The Revised Reports.* Edited by Sir FREDERICK POLLOCK, assisted by R. CAMPBELL and O. A. SAUNDERS. Vol. IV. 1796–1799, (3 & 4 Vesey—7 & 8 T. R.—1 Bos. & P.—3 Anstruther—2 Peake). London: Sweet & Maxwell, Limited; Boston, Mass.: Little, Brown & Co. 1892. La. 8vo. xviii and 937 pp. (25*s.*).—The Preface to this volume states that although the period covered (1796–1799) was 'not rich in leading cases of the first rank,' it produced 'many of great importance. *Morton* v. *Lamb* (7 T. R. 125) is one of the best known and most profitable in the learning of dependent and independent promises. *Gordon* v. *Harper* (7 T. R. 9) is a landmark in the law of possessory remedies. . . . . *Jennings* v. *Rundall* (8 T. R. 335) is in some sense a leading case on the liability of infants, and on the rule (now much less important than it was a century ago), that substantive liability cannot be altered by changing the form of action. Yet it does not seem clear that the principle was rightly applied in the particular case. However, this is immaterial at the present time.' The editor specially invites 'serious and competent criticism.'

*The Land Systems of British India.* By B. H. BADEN-POWELL, C.I.E. Three vols., containing fourteen maps. Oxford: Clarendon Press. 8vo. xxxii and 2104 pp. (£3 3*s.*)—We hope to review this work in our next number.

*The Roman Law of Testaments, Codicils and Gifts in the event of death.* By MOSES A. DROPSIE. Philadelphia: T. & J. W. Johnson & Co. 1892. xi and 197 pp.

*The Contract of Sale in the Civil Law with reference to the Laws of England, Scotland, and France.* By J. B. MOYLE. Oxford: Clarendon Press. 1892. 8vo. xiii and 271 pp. (10*s.* 6*d.*)

*Parliamentary Procedure and Practice, with a view of the origin, growth, and operation of Parliamentary Institutions in the Dominion of Canada.* By JOHN GEORGE BOURINOT. Second edition, revised and enlarged. London: Sampson Low, Marston & Co., Lim. 1892. 8vo. xx and 929 pp.

*The Ottoman Land Code.* Translated from the Turkish by F. ONGLEY. Revised, with marginal notes and index, by HORACE E. MILLER, LL.B. London: W. Clowes and Sons, Lim. 1892. 8vo. xii and 396 pp.

*Concise Precedents under the Companies Acts* 1862 *to* 1890. By F. GORE-BROWNE. London: Jordan & Sons. 1892. 8vo. xxiv and 548 pp. (10*s.* 6*d.*)

*A Handy Book on the Formation, Management, and Winding Up of Joint Stock Companies.* By W. JORDAN and F. GORE-BROWNE. Fifteenth edition. London: Jordan & Sons. 1892. xxiv and 312 pp. (3*s.* 6*d.*)

*Handy Guide to County Court Costs.* Second edition. By JOHN HOUGH. London: W. Scott. 1892. 8vo. 180 pp. (5*s.*)

*The Practice of the Supreme Court and Court of Appeal of New Zealand.* By Sir ROBERT STOUT and W. A. SIM. Dunedin: James Horsburgh. 1892. La. 8vo. xxxvi and 262 pp.

*The Crown Lands Acts now in force in New South Wales.* By A. P. CANAWAY. Sydney: C. F. Maxwell. 1891. La. 8vo. viii and 337 pp. (21*s.*)

*A Treatise upon the Employers' Liability Act of New South Wales.* By C. G. WADE. Sydney: C. F. Maxwell. 1891. 8vo. xvi and 210 pp. (12*s.* 6*d.*)

*Property: its Origin and Development.* By CH. LETOURNEAU. London: Walter Scott. 1892. 8vo. xii and 401 pp. (3*s.* 6*d.*)

*Synthèse de l'antisémitisme.* Par EDMOND PICARD. Brussels: Larcier. Paris: A. Savine. 1892. 8vo. 232 pp. (3 fr.)

*La question d'Alsace.* Par JEAN HEIMWEH. Second edition. Paris: Hatchette et Cie. 1892. 8vo. x and 253 pp.

*La régime des Passeports en Alsace-Lorraine.* Paris: A. Lahure. 1890. 8vo. 76 pp. (1 fr.)

*The Practice in Lunacy.* By JOSEPH ELINER. Seventh edition. London: Stevens & Sons, Lim. 1892. 8vo. xx and 481 pp. (21*s.*)

*An Epitome of Real Property Law for the use of Students.* By W. H. HASTINGS KELKE. London: Sweet & Maxwell, Lim. 1892. 8vo. x and 160 pp. (6*s.*)

*The Roman Law of Sale.* By JAMES MACKINTOSH. Edinburgh: T. & T. Clark. 1892. 8vo. xv. and 272 pp. (10*s.* 6*d.*)

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*The Editor cannot undertake the return or safe custody of MSS. sent to him without previous communication.*

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